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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1933

STATE OF FLORIDA, et al.,
APPELLANTS,

vs. No. 342

UNITED STATES OF AMERICA, et al.,
APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

BRIEF OF APPELLANTS

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1933

STATE OF FLORIDA, EUGENE S. MATTHEWS, MAMIE EATON-GREENE, and W. B. DOUGLASS, Etc., et al.,

Appellants,

vs. **No. 342**

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GEORGIA PUBLIC SERVICE COMMISSION, and ATLANTIC COAST LINE RAILROAD,

Appellees.

Appeal From
the District Court of the United States
for the Northern District of Georgia,
Atlanta Division

BRIEF OF APPELLANTS

REFERENCE TO OFFICIAL REPORT OF THE OPINION DELIVERED IN THE DISTRICT COURT, AND THE REPORTS AND ORDERS OF THE INTERSTATE COMMERCE COMMISSION.

The opinion of the Court below was rendered and filed in the Clerk's office on February 24th, 1933, and is cited as "State of Florida, et al., vs. United States of America, et al.," reported in 4 F. Supp. 477. The reports and orders of the Interstate Commerce Commission are dated respectively July 5th, 1932, and cited, "Georgia Public Service Commission vs. Atlantic Coast Line Railroad Company", reported in 186 I. C. C. 157, and January 9th, 1933, cited, "Georgia Public Service Commission vs. Atlantic Coast Line Railroad Company", reported in 190 I. C. C. 588.

REFERENCE TO OFFICIAL REPORTS OF THE OPINIONS INVOLVING AN ORDER OF THE INTERSTATE COMMERCE COMMISSION ENTERED IN THE SAME PROCEEDING AND SET ASIDE PURSUANT TO THE DECREE OF THIS COURT.

Opinion of the Supreme Court of the United States, dated January 5, 1931, reported in 282 U. S. 194, cited as State of Florida et al vs. United States of America et al;

Opinion of the United States District Court for the Northern District of Georgia, dated January 17th, 1929, reported in 30 Fed. (2d) 116, and cited as "State of Florida, et al., vs. United States of America, et al";

Opinion of the same Court, dated March 22nd, 1929, re-

ported in 31 Fed. (2d) 580, and cited as "State of Florida, et al., vs. United States of America, et al";

Report of the Interstate Commerce Commission dated August 2nd, 1928, cited as "Georgia Public Service Commission vs. Atlantic Coast Line Railroad Company", and reported in 146 I. C. C. 717.

STATEMENT AS TO JURISDICTION

On April 19th, 1933, the appellants filed and served upon all opposing counsel their separate typewritten statement in compliance with Paragraph 1 of Rule 12 of the Revised Rules of Practice of this Court. Under date of May 1, 1933, the Atlantic Coast Line Railroad Company, one of the appellees, filed its typewritten statement against the jurisdiction of this Court, including a motion to dismiss the appeal or affirm the decision of the lower Court. Briefs upon the motion to dismiss or affirm were filed by the appellants and said appellee, and on October 9th, 1933, this Court noted probable jurisdiction in the case and ordered that further consideration of the motion to dismiss or affirm be postponed to the hearing of the case on the merits.

STATEMENT OF THE CASE

This is an appeal from a final decree of the United States District Court for the Northern District of Georgia, Atlanta Division (R. 620), dated February 24th, 1933, which sitting as a specially constituted three-judge Federal statutory court (38 Stat. at L. 219), denied the relief sought by the appellants (as complainants in equity below)

and refused to enjoin an order of the Interstate Commerce Commission contended by the appellants to be unlawful (R. 620).

The proceedings in the Court below originated in three separate bills and supplemental bills filed respectively by: State of Florida and Florida Railroad Commission against the United States of America and Interstate Commerce Commission (R. 1 and 338); Wilson Cypress Company and Wilson Lumber Company of Florida against the United States of America and Interstate Commerce Commission (R. 419 and 465); and F. S. Buffum Company, Incorporated against the United States of America and Interstate Commerce Commission (R. 527 and 551). The Atlantic Coast Line Railroad Company and the Georgia Public Service Commission intervened in each of the suits (R. 312-313, 443, 582, 415, 523 and 602).

At the final hearing the several constituent causes were consolidated into a single cause entitled, "State of Florida, et al., complainants, vs. United States of America, and Interstate Commerce Commission; Atlantic Coast Line Railroad Company, Intervener, Respondents" (R. 607). A single final decree was entered in the consolidated cause (R. 620). The complainants in the constituent and consolidated cause sought and were allowed appeals from the final decree (R. 1385 and 1394).

The final decree of the District Court in terms sustained the orders of the Interstate Commerce Commission dated July 5th, 1932, and January 9th, 1933, establishing intrastate rates on logs between points on the Atlantic Coast Line Railroad Company within and throughout the State of Florida without exception. The order of the Inter-

state Commerce Commission insofar as it purported to fix intrastate rates was assailed by the State of Florida and the complainants in the other constituent causes as being outside the scope of the issues in the proceeding in which the order was entered and without substantial evidence to support it, as being an arbitrary abuse of Federal power, and as extending beyond the statutory authority of the Interstate Commerce Commission and the limits of the Federal power under the Federal Constitution.

As has been hereinabove stated, a former order of the Interstate Commerce Commission dated August 2nd. 1928, in the same proceeding, which order prescribed interstate rates on logs from points in the Northern portion of Florida to points in Georgia on the Atlantic Coast Line Railroad and likewise undertook to establish intrastate rates on logs between points on that railroad within and throughout the State of Florida, was upheld by the District Court in two separate opinions (30 Fed. (2d) 116 and 31 Fed. (2d) 580) and set aside by this Court (282 U. S. 194) insofar as it undertook to establish intrastate rates. The interstate feature of the order, that is, the rates prescribed from points in the Northern portion of Florida to points in Georgia on the railroad has never been modified or attacked, since as we shall hereinafter show no logs ever moved under those rates from Florida to Georgia. After the intrastate feature of the order was set aside the Interstate Commerce Commission re-opened the proceeding and subsequently entered therein the orders with respect to intrastate Florida commerce which are here under attack.

The record in this proceeding upon which that former order of the Interstate Commerce Commission was entered

is a part of the record here and is contained in the printed transcript of the record in the case of State of Florida, et al. versus United States of America, et al., and companion cases, Numbers 16, 17 and 18 of the October Term, 1930, of this Court, the opinion in which is reported in 282 U. S., 194 et seq. That portion of the record is referred to herein as the former record (Former Record,). The proceedings which have taken place since this Court reversed the District Court and set aside the order of the Interstate Commerce Commission are set forth in the newly printed transcript of record, composed of two volumes, which is referred to as the record (R.). Certain exhibits before the Commission being voluminous or from their nature difficult to re-print are by stipulation (R. 1409) bound in a separate volume. Necessarily our statement deals with this proceeding since its inception.

(a) The Original Proceedings Before the Interstate Commerce Commission.

The proceedings before the Interstate Commerce Commission were adversary proceedings, instituted by a complaint in which the Georgia Public Service Commission was sole complainant, and the Atlantic Coast Line Railroad Company was sole defendant (Former Record, 193). The gravamen of the complaint was the alleged unreasonable level of the interstate rates on logs over six feet in length (except walnut, cherry and cedar) from points of origin in Florida, to destinations in Georgia, and the relationship between that rate on the one hand and the mileage scale of intrastate rates of the same character between points in

Florida up to 170 miles on the other hand. The announced purpose of the complaint was to extend the scale of Florida intrastate log rates, known as the Cummer scale, into interstate commerce from Florida to Georgia (Former Record, 417-418). The complainant asserted that the proceeding was not a revenue case (Former Record 417).

The Atlantic Coast Line appeared in defense of both the interstate rate and the intrastate rate, denying by its answer any violation on its part of the Interstate Commerce Act as amended, and demanding that "it be hence dismissed" (Former Record, 199-200). It disclaimed any contention that the Cummer scale of rates was not compensatory and stated as its position of record that it had not made and was not making any proposal to revise those intrastate rates (Former Record, 491, 495). The State of Florida was notified pursuant to the laws of Congress and while it filed no formal answer appeared in the proceedings in due course. Various interventions were allowed, conditioned that the scope of the proceedings be not broadened (Typical, Former Record, 209).

On August 2nd, 1928, the Interstate Commerce Commission filed its report and order (Former Record, 16-28). In its report it stated that while the complaint assailed the rates from all Florida points, the record showed that so far as the interstate rates were concerned relief was desired only with respect to the rates on logs "from that portion of Florida lying North of and including Jacksonville, Gainesville, Burnett's Lake and High Springs", described as North Florida, "to destinations in Georgia for distances not exceeding 170 miles". It prescribed interstate rates from points of origin in that small area of North Florida and not

elsewhere. (146 I. C. C. 717). No actual movement of logs from Florida to Georgia was shown. But notwithstanding that fact, the Interstate Commerce Commission found that such intrastate rates resulted and would result in undue preference and advantage of shippers of intrastate traffic within the State of Florida, in undue prejudice to shippers of interstate traffic from points in the State of Florida to points in the State of Georgia, and in unjust discrimination against interstate commerce. Accordingly, the Interstate Commerce Commission by its amended and clarified orders (Former Record, 26-28 and 91) fixed state-wide, and without exception throughout the State of Florida, intrastate rates for the transportation of logs over the lines of the defendant carrier which were the same as the rates fixed for the non-existent interstate commerce between points in North Florida and Georgia.

(b) The Former Proceedings in the District Court of the United States for the Northern District of Georgia, and in this Court.

Having no recourse to any other remedy The State of Florida thereupon filed its bill in the United States District Court for the Northern District of Georgia, Atlanta Division, that being the forum under the appropriate Federal statute in which it had to proceed, to enjoin the intrastate feature of the order of the Interstate Commerce Commission. Two similar bills were filed by the Florida lumber companies, who are among the appellants in the consolidated cause now at bar. The causes were combined for trial and heard by the United States District Court for the

Northern District of Georgia upon hearing and rehearing (30 Fed. 2d. 116; 31 Fed. 2d. 580).

Upon the rehearing the District Court upheld the intrastate order not "because of undue prejudice to shippers and localities, or because of undue discrimination against the *particular* interstate commerce" in the described logs, but solely upon the ground that the order was aimed at a discrimination "against *general* interstate commerce", caused by intrastate rates which were so low as to throw an undue burden upon the interstate revenues of the carrier. It thereupon entered decrees dismissing the bills of complaint and supplemental bills.

A direct appeal was taken from the District Court to this Court, and this Court in due course in its opinion and judgment rendered January 5th, 1931 (Florida vs. United States, 282 U. S. 194) reversed the decree of the District Court and ordered "that the portion of the order of the Commission which is now under review with respect to intrastate rates * * * must be set aside.". The ultimate ground of the reversal was for "the lack of basic or essential findings required to support the Commission's order". But as an incident to that ultimate finding, this Court examined the scope of the operation of the Federal and State powers and the character and sufficiency of the evidence upon which the Commission had attempted to act.

A few days after the coming down of the opinion and before the coming down of the mandate of this Court, the Atlantic Coast Line Railroad Company filed in this Court a motion asserting among other things that the trouble with the order of the Interstate Commerce Commission was procedural only and praying that this Court withhold its

mandate until such time as the Interstate Commerce Commission should have made further and additional orders in the proceedings upon the record before the Interstate Commerce Commission. But this Court denied that motion and transmitted its mandate to the District Court. And that mandate in due course was made effective by the order of the District Court and the order of the Interstate Commerce Commission, insofar as it sought to prescribe intrastate rates, was enjoined, annulled and set aside.

(c) The Further Hearings Had Before the Interstate Commerce Commission Under Its Order of April 6, 1931.

At or about the time that the United States District Court for the Northern District of Georgia made, to-wit, on March 7th, 1931, the order that it should have made in the first instance, the complainant, the Georgia Public Service Commission, and the defendant, Atlantic Coast Line Railroad Company, filed simultaneous motions before the Interstate Commerce Commission (R. 1078-1087) which patently were intended to be the one complementary to the other.

The motion of the Georgia Commission (R. 1084-1087) requested that the Federal Commission reopen the proceedings and make the determinations required by the situation and prescribe just, reasonable, non-discriminatory and non-prejudicial interstate rates from points in Florida to destinations in Georgia and that those rates be no higher than the Florida intrastate rates in effect at the same time. The motion of the Atlantic Coast Line Railroad Company

(R. 1078-1083) requested that the Federal Commission reopen the proceedings and make such further findings, reports and orders as it might deem to be requisite or necessary and that it prescribe such intrastate rates in Florida for the transportation of logs for distances up to and beyond 170 miles as might be lawful.

It is thus to be observed that the gravamen and primary purpose of the motion of the Georgia Public Service Commission (like the gravamen of its original complaint) was to invoke the direct Federal power to prescribe reasonable rates for the (non-existent) log traffic in interstate commerce from points in Florida to destinations in Georgia, a thing which the Interstate Commerce Commission had already done in this proceeding with respect to North Florida points by the portion of the order of August 2, 1928, to which no party has ever taken exception. The gravamen and primary purpose of the motion of the Atlantic Coast Line Railroad Company was to invoke direct Federal power to prescribe such intrastate rates "as may be lawful", that is to say, to fix the reasonableness per se of the intrastate rates.

Neither the motion of the Georgia Commission nor the complementary motion of the carrier asserted in issuable form, or indeed asserted at all, that the level of the Florida intrastate rates was so low as to constitute a revenue burden either upon interstate commerce or upon the general revenues of the carrier.

The State of Florida and the Florida Railroad Commission filed a reply (R. 1094-1098) to these motions in which they averred: that in the original proceedings the primary issue was the level of the interstate rate and that the intra-

state rate was involved only incidentally in its relation to the interstate rate; that the interstate rates prescribed by the Commission were still in effect and that the Georgia Commission had secured all the relief desired in the proceedings; that the result of the former order of the Commission had been to destroy valuable property and wipe out prosperous communities and likewise to diminish the revenues of the carrier from the transportation of logs; that the Cummer Scale had been voluntarily put into effect by the carrier and had become the lawful state rate in Florida and that no application had been made to the State authorities to change it; that this Court had declared that the authority to determine the reasonableness per se of that rate lay with the State authorities and not with the Interstate Commerce Commission; that the Florida Railroad Commission was ready and willing at any proper time upon the application of anyone to consider and determine in accordance with Florida law the level of the intrastate rate; and that although there had been a parity between the interstate and intrastate rates during the two years in which the former order of the Interstate Commerce Commission had been effective no interstate traffic had developed and none would develop. The reply therefore asserted that the motions to reopen the proceedings should be denied.

On April 6, 1931, the Interstate Commerce Commission made an order re-opening the proceeding for "further hearing" (R. 1098). The purpose of such "further hearing" was not stated. When the Georgia Public Service Commission proposed to introduce evidence these complainants, directing attention to the state of the record as recited above, asked that the Georgia Public Service Commission, as com-

plainant in the proceeding there, be required to state whether it had abandoned its position that this was not a revenue case and that there was no reason for the increase of any rates (R. 622). The presiding Examiner ruled that it was not necessary for the Georgia Commission to answer this inquiry, to which ruling an exception was taken (R. 624 and 638-639).

At the beginning of the re-opened proceedings the State of Florida, through the Chairman of the Florida Railroad Commission, asserted that the authority to determine the reasonableness of the State rates lay with the Florida Railroad Commission; that these rates had been voluntarily initiated more than fifteen years theretofore and when established had become the lawful state rates; that the laws of Florida prohibited any change or increase of those rates without the consent and approval of the Florida Railroad Commission and after due notice to the interested parties and a hearing; that no complaint had ever been made to the Florida Railroad Commission about the level of that rate although its door all that time had been open to anyone dissatisfied with that rate; that the result of the proceedings before the Interstate Commerce Commission had been to injure and destroy intrastate commerce within the State of Florida, and to injure and destroy individuals and whole communities in Florida without benefitting anyone in Georgia or in Florida; and that the Florida Railroad Commission considered that the Interstate Commerce Commission was without the power to invade the domain of the State in this matter, but if it had such power it should not exercise it until the Railroad Company had applied to the State of Florida for such relief as it might deem itself en-

titled to have (R. 622-623). To this position the State of Florida throughout these proceedings has steadfastly adhered, and it now and here reasserts that position and insists upon it.

The Georgia Public Service Commission offered no evidence except rate comparisons. Upon the conclusion of its evidence the following motion was made (R. 649):

> "Come now intervening shipper defendants herein, and in the light of the Examiner's ruling declaring that the undue burden issue is involved in this case by the proceedings of the complainant, respectfully move dismissal of that part of the complaint of the Georgia Public Service Commission, which as thus construed, would allege that the Cummer Scale of the Florida intrastate log rates unduly burdens interstate commerce."

That motion was transmitted to and denied by the Commission. *Georgia Pub. Serv. Comm. v. Atlantic Coast L.R. Co.*, 186 *I. C. C.* 157, 160.

The Examiner, over the objection of these complainants, allowed the Atlantic Coast Line Railroad Company to undertake to prove affirmatively against itself the allegations of the complaint which it had denied in its answer and which it had thereto[illegible]re expressly disclaimed in stating its position of record in the proceeding (R. 648-650).

The insufficiency of the evidence to support the order under attack will be the subject of comment in another portion of this brief. We content ourselves here in pointing out that in the proceedings re-opened by the Commission's

order of April 6, 1931, the evidence consisted of rate comparisons and cost studies. Most of the rate comparisons were duplications of those filed in the original proceedings. The cost studies consisted of a series of system, or division averages applicable alike to all traffic and were insufficient to demonstrate the cost of the transportation of the particular traffic in question, to-wit, logs. The evidence showed that the dire result prophesied by the Florida interveners that "any material increase in the Florida intrastate rate would either cause them to move their plants to the timber or abandon operations" in the main had been realized, Of the train load shippers, all save one had discontinued transporting logs by the carrier, and millions of dollars of property in plants and communities had been wiped out.

The evidence showed that the traffic in pine logs had all but been destroyed, and that the traffic in cypress and hardwood logs was rapidly running the same course. The presiding Examiner in his proposed report (R. 1209-1232) recommended two rates, the one being the rate originally prescribed by the order of the Interstate Commerce Commission which was condemned by this Court. That rate was to be applicable between all points on the defendant carrier's lines in Florida, except between Hines and Palatka. The rate recommended for the Hines to Palatka movement (the movement of the sole then remaining train load shipper) was 1 cent per 100 pounds lower than the applicable rate under the scale prescribed by the former order of the Interstate Commerce Commission for that movement. Exceptions were filed to the Examiner's report. On July 5th, 1932, the Commission issued its report and order (R. 27-

79) which is the subject of attack here. The report and order confirmed the interstate rate originally fixed from North Florida points of origin to Georgia destinations by the order of August 2nd, 1928. No attempt was made in the new report or order to fix interstate rates elsewhere than in that limited area. That report and order found as a fact that no movement from Florida to Georgia had been shown during the two years when the interstate rate and the intrastate rate had been upon the same level. So in its new order the Commission made no finding with respect to persons and localities. But it found the so-called Cummer Scale caused an unjust discrimination against interstate commerce from a revenue standpoint and prescribed for application in intrastate commerce between all points on the lines of the defendant carrier in Florida the same rate which had been prescribed by the order which was set aside by this Court.

Bills in equity were filed to enjoin the order of the Interstate Commerce Commission, the one bill filed by the State of Florida, the other by Wilson Cypress Company and Wilson Lumber Company of Florida. Hearing was had upon them on September 14th, 1932, and the Court entered a stay of the order of the Commission for not exceeding sixty days (R. 333 and 460).

(d) The Second Re-Opened Proceedings Before the Interstate Commerce Commission.

Meanwhile, in October, 1932, shortly after the filing of the constituent bills in this cause, the appellants the State of Florida and the Wilson Cypress Company and Wilson

Lumber Company of Florida filed before the Interstate Commerce Commission their motions and petitions (R. 1293-1301 and 1280-1285) to set aside the order of the Interstate Commerce Commission dated July 5th, 1932, and to re-open the proceedings upon the ground (among others) that at or about the time that the Interstate Commerce Commission was preparing and promulgating its order dated July 5th, 1932, greatly increasing the level of the Florida intrastate rate, the Interstate Commerce Commission was permitting the other trunk line carriers in the Southern and Southwestern rate groups (whose rates had been employed as a standard of comparison for the superseded Cummer Scale) to establish and maintain in interstate commerce (as well as in intrastate commerce) per car rates for the transportation of logs which in practical operation and effect were as low as or lower than the Cummer Scale.

On October 21st, 1932, the Interstate Commerce Commission entered its order (R. 1315-1316) suspending the operation of its order of July 5th, 1932, and the proceedings before it were re-opened the second time "for the sole purpose of receiving evidence respecting any change in the rates on logs since the close of the last hearing herein (that is, taking of the last testimony on July 21st, 1931), the circumstances connected with and the conditions which occasioned such changes, and whether such circumstances and conditions or any of them, are present with respect to the Florida intrastate log rates of the defendant". Further hearing was had.

Meanwhile additional railroads had published tariffs establishing the new rates. The record shows that these

Newly Reduced Rates have been published by not less than twenty-three railroads in fourteen Southern and Southwestern States. Such railroads and a general statement of the extent to which the Newly Reduced Rates are applicable over them are as follows:

In the Southern Rate Group

Railroad	Application
Louisville & Nashville Railroad,	Between all stations south of Ohio River.
Nashville, Chattanooga & St. Louis Railway,	Between all stations.
Gulf, Mobile & Northern Railroad,	Between all stations.
Georgia & Florida Railroad,	Between all stations.
Illinois Central Railroad,	To eleven stations in Mississippi, Tennessee and Louisiana.
Yazoo & Mississippi Valley Railroad,	To twenty-two stations in Louisiana, Mississippi and Tennessee east of the Mississippi River.
St. Louis-San Francisco Railway,	Between all stations in Alabama, Florida and Mississippi and to Memphis, Tennessee.
Mobile & Ohio Railroad,	To eight stations in Alabama, Mississippi, Tennessee and Kentucky.
Southern Railway,	To ten stations in Alabama, Mississippi, South Carolina and Tennessee.

Seaboard Air Line Railway,	To one station in Alabama and two stations in Virginia.
Savannah & Atlanta Railway,	To three stations in Georgia.
Central of Georgia Railway,	To two stations in Georgia and two stations in Alabama.
Atlantic Coast Line Railroad,	To one station in Alabama and two stations in South Carolina.
Columbus & Greenville Railroad,	To four stations in Mississippi.
Gulf & Ship Island Railroad,	To two stations in Mississippi.
Mississippi Central Railroad,	To two stations in Mississippi.
Tennessee, Alabama & Georgia Railway,	To two stations in Alabama and Tennessee.
Western Railway of Alabama,	To two stations in Alabama.
Norfolk & Southern Railroad,	To one station in Virginia.
New Orleans & Northeastern Rail road,	To one station in Mississippi.
St. Louis Southwestern Railway,	To one station in Tennessee.
Chicago, Rock Island & Pacific Railway,	To one station in Tennessee.

In the Southwestern Rate Group

Railroad	Application
Chicago, Rock Island & Pacific Railway,	Between all stations in Arkansas and Louisiana.
Missouri Pacific Railway,	Between substantially all stations in Louisiana, Missouri, Arkansas, Oklahoma and Texas.
St. Louis-San Francisco Railway,	Between all stations in Arkansas and Missouri and from one station in Oklahoma.
St. Louis Southwestern Railway,	Between all stations in Arkansas, Louisiana and Missouri.
Yazoo & Mississippi Valley Railroad,	Between substantially all stations in Louisiana west of the Mississippi River.

A more detailed statement of these rates and their application and the references to their location in the record is hereinafter set forth.

The record shows that these Newly Reduced Rates were applicable both in interstate and intrastate commerce on substantially the same level over all or part of all of the railroads specified above within and between Florida, Alabama, Mississippi, Louisiana, Tennessee, Georgia, North Carolina, South Carolina, Virginia, Kentucky, Missouri, Arkansas, Oklahoma and Texas. They are applicable in Florida in intrastate and interstate commerce on the Louisville & Nashville Railroad, the St. Louis-San Francisco Railway, the Georgia & Florida Railroad and the Central of Georgia Railway. As is pointed out above, on some of the

railroads the Newly Reduced Rates were made applicable to particular stations which are lumber manufacturing points. On many others, including the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway (Atlantic Coast Line affiliates) they were applicable between all, or substantially all stations, interstate as well as intrastate.

There is no doubt that in Louisiana, Mississippi, Alabama, Tennessee, parts of Georgia and Western Florida, the general level of interstate and intrastate rates are on the basis of the Newly Reduced Rates. It will not do to say that the Newly Reduced Rates apply only in the Western portion of Southern territory. The maps (R. 388 and 490) attached to the Supplemental Bills show approximately the location of the lines over which they are applicable. For instance, it will be observed that they have largely superseded the so-called "Alabama Scale" in Alabama, (the scale prescribed by the Interstate Commerce Commission for intrastate commerce in Florida was frequently called the Alabama Scale"). They are in effect in parts of Florida, Georgia, and in Eastern Tennessee as well. We think it fair to say that the Newly Reduced Rates or their substantial equivalent now constitute the general level of intrastate and interstate log rates in the greater part of Southern territory in which the lumber manufacturing industry is still a substantial industry.

Some of these were shown to be transit rates, but many of them were shown to be local or proportional rates. The appellants offered to prove that in practical operation and effect the Florida intrastate scale (the Cummer Scale) was tantamount to a transit rate, in that substantially all

or the greater part of the product manufactured from the logs moved over the lines of the defendant carrier (R. 960 and 991). They offered to prove this by testimony given by the Freight Traffic Manager of the Atlantic Coast Line Railroad in another proceeding (R. 1066-1067). But this testimony was excluded (R. 960, 992 and 1067).

Furthermore, the record discloses that the appellants Wilson Cypress Company and Cummer Cypress Company and every other trainload shipper of logs were required by the terms of a written contract (Former Record, 329, 337 and 261) with the appellee Atlanti Coast Line Railroad Company (supported by a bond) to ship over the Atlantic Coast Line Railroad and the lines of its connecting carriers, the outbound product manufactured from the inbound logs, providing the rates of competing carriers are not lower. The trainload movement constituted substantially more than the carload movement (Former Record, 476-477 and 797, and R. 661).

On January 9th, 1933, the Interstate Commerce Commission handed down its second report on further hearing (190, I. C. C. 588). **It found as a fact that the Newly Reduced Rates per car of logs regardless of weight are "on substantially the same level as the Cummer Scale"** (text 589). Yet notwithstanding all this, the Interstate Commerce Commission fixed the Florida intrastate rate at a level which in practical operation and effect is more than twice that of the new general level which had been established between and throughout most of the States constituting the Southern and Southwestern rate groups and was rapidly being further extended within them.

(e) The Proceedings in the District Court in the Case at Bar.

Promptly after the filing of the second report of the Interstate Commerce Commission of January 9th, 1933, the appellants respectively tendered their supplemental bills (R. 338, 465 and 551) setting up the new and additional facts with respect to the second report and order of the Interstate Commerce Commission on the further hearing, and additional grounds for relief consequent upon it. The supplemental bills were allowed as supplemental pleadings (R. 390), answers filed, and the causes were consolidated (R. 389-390) and heard by a Court of three judges on the bills and supplemental pleadings, answers and evidence, and a single decree was rendered thereon on February 24th, 1933. By that decree (R. 620) the orders of the Interstate Commerce Commission in the re-opened proceedings dated July 5, 1932, and the order of the Interstate Commerce Commission in the second re-opened proceeding dated January 9th, 1933, were sustained and the prayers of the bills of complaint to enjoin such orders were refused.

Direct appeal was taken to this Court under section 210 of the Judicial Code (38 Stat. at L. 220). Petition for appeal was duly filed and appeal allowed by the District Court.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

The appellants in due course filed in the District Court their joint and several assignments of errors (R. 1386-

1393), all of which are intended to be urged. They are that the District Court erred as follows:

1. In denying the relief prayed in the bills of complaint and supplemental bills of complaint herein.

2. In failing and refusing to suspend, annul and permanently enjoin the orders of the Interstate Commerce Commission herein involved.

3. In holding that an unjust discrimination against interstate commerce had been made to clearly appear.

4. In failing to find that no substantial disparity exists between the Florida Intrastate rates on logs and the general level of rates on logs in interstate commerce in the southern carrier rate group.

5. In failing and refusing to hold that the report and order of the Interstate Commerce Commission of July 5, 1932, as amended, and the report and order of said Commission of January 9, 1933, were unreasonable and arbitrary.

6. In failing and refusing to find that the Interstate Commerce Commission had not made the findings declared by the Supreme Court of the United States to be essential pre-requisites to the making of a valid order of the character here attempted to be made by the Interstate Commerce Commission with respect to Florida intrastate rates on logs.

7. In failing and refusing to find that there was no substantial evidence in the record to support the findings declared by the Supreme Court of the United States to be essential pre-requisites to the making of a valid order of the character here attempted to be made by the Interstate Commerce Commission with respect to Florida intrastate rates on logs.

8. In holding that the findings of fact upon which the Interstate Commerce Commission relied to justify its said orders prescribing intrastate rates were warranted by the evidence and were made to clearly appear by the evidence.

9. In failing and refusing to hold that the Interstate Commerce Commission made no finding of the amount of revenue which had been derived in the past by the Atlantic Coast Line Railroad Company from the particular traffic in question under the existing intrastate rate (the Cummer Scale).

10. In failing and refusing to hold that the evidence warranted no finding by the Interstate Commerce Commission of the amount of revenue which had been derived in the past by the Atlantic Coast Line Railroad Company from the particular traffic in question under the existing intrastate rate (the Cummer Scale).

11. In finding that there was no substantial increase in the log traffic after the Cummer Scale of rates was restored following the decision of the Supreme Court upon the former order of the Interstate Commerce Commission.

12. In holding that the refusal of the Interstate Commerce Commission to require the Atlantic Coast Line Railroad Company to produce information as to the number of cars of logs moving within the State of Florida during each of the years 1926, 1927, and 1928, and as to the revenue derived therefrom, constitutes no cause to upset the order of the Interstate Commerce Commission herein involved.

13. In failing and refusing to hold that the Interstate Commerce Commission made no finding of the amount of revenue which can be reasonably expected to be derived from the traffic in question under the increased intrastate rate which the Interstate Commerce Commission had ordered established.

14. In failing and refusing to hold that the evidence warranted no finding by the Interstate Commerce Commission of the amount of revenue which can be reasonably expected to be derived from the traffic in question under the increased intrastate rate which the Interstate Commerce Commission had ordered established.

15. In finding that the future log traffic under the intrastate rate on the Atlantic Coast Line Railroad in Florida will likely amount to at least 7431 cars per year.

16. In holding that if the log traffic done in Florida on the Cummer Scale is at an out-of-pocket loss, the less of it done the better.

17. In failing and refusing to hold that the Interstate Commerce Commission made no finding that the application of the existing intrastate rate (Cummer Scale) resulted in an impairment of the income of the carrier which caused an undue burden upon the carrier's interstate revenues and obstructed the maintenance of an adequate national transportation system.

18. In failing and refusing to hold that the evidence warranted no finding by the Interstate Commerce Commission that the application of the existing intrastate rate (Cummer Scale) resulted in an impairment of the income of the carrier which caused an undue burden upon the carrier's interstate revenues and obstructed the maintenance of an adequate national transportation system.

19. In failing and refusing to hold that the Interstate Commerce Commission made no finding that an undue burden upon the carrier's interstate revenues and obstruction to the maintenance of an adequate national transportation service existed which was of such character and consequence that it was the affirmative duty of the Interstate Commerce Commission as an important step in maintaining an adequate national railway system to remove such burden and obstruction.

20. In failing and refusing to hold that the evidence warranted no finding by the Interstate Commerce Commission that an undue burden upon the carrier's interstate revenues and obstruction to the maintenance of an adequate national transportation service existed which was of such character and consequence that it was the affirmative duty of the Interstate Commerce Commission as an important

step in maintaining an adequate national railway system to remove such burden and obstruction.

21. In failing and refusing to hold that the Interstate Commerce Commission made no finding that the alteration of the intrastate rates would produce, or was likely to produce an additional and greater amount of income, and made no finding, that such additional and greater amount of income was necessary to prevent an existing undue burden upon the carrier's interstate revenues and necessary to maintain an adequate national transportation service.

22. In failing and refusing to hold that the evidence warranted no finding by the Interstate Commerce Commission that the alteration of the intrastate rates would produce, or was likely to produce an additional and greater amount of income, and that the evidence warranted no finding that such additional and greater amount of income was necessary to prevent an existing undue burden upon the carrier's interstate revenues and necessary to maintain an adequate national transportation service.

23. In failing and refusing to hold that the Interstate Commerce Commission made no finding of the quantity or extent of any burden upon the interstate revenues of the carrier caused by the application of the existing Florida intrastate rate (Cummer Scale).

24. In failing and refusing to hold that the evidence warranted no finding by the Interstate Commerce Commission of the quantity or extent of any burden upon the interstate revenues of the carrier caused by the application of the existing Florida intrastate rate (Cummer Scale).

25. In failing and refusing to hold that in making said orders the Interstate Commerce Commission considered and gave effect to rate comparisons, system average costs and other matters relating to costs of transportation which were incompetent and insufficient to furnish the basis for the conclusions reached therefrom and incom-

petent and insufficient to furnish the basis for any such reports and order.

26. In finding that "in 1928 and 1932 comparisons of these rates (Cummer Scale) with other rates on logs and on similar traffic in the same and neighboring territories showed them to average less than half of most other comparable interstate and intrastate rates, and to be much the lowest of any of them."

27. In finding that on the question of the cost of the service figures were considered which showed the average cost of hauling logs over the Atlantic Coast Line Railroad system.

28. In holding that Appendix E of the report of the Interstate Commerce Commission is the conclusion of that Commission "as to the cost of hauling logs in Florida for the distance shown to be the average under the Cummer Scale, based on the evidence which had been produced to it as tending to show such cost."

29. In finding that there was "an out-of-pocket loss to the carrier in the log traffic under these rates (Cummer Scale)."

30. In holding that if it appeared that a loss was produced by the States Rates which would in the future be substantial and that the carrier was not in position to absorb it without detriment to its service and support as an interstate carrier, a sufficient case had been made to find an unjust discrimination against interstate commerce and to require its correction.

31. In failing and refusing to hold that the Interstate Commerce Commission by indirection seeks to determine the reasonableness per se of the Florida intrastate rate (the Cummer Scale), a thing which the Supreme Court of the United States has declared lies with the State authority and not with the Interstate Commerce Commission.

32. In failing and refusing to hold that said Interstate Commerce Commission had attempted to prescribe in-

trastate rates in Florida applicable to territory for which no interstate rates have been prescribed and in which no general investigation of rate levels whether on interstate or on intrastate traffic has been made, and that in so doing the Interstate Commerce Commission has exceeded its authority.

33. In failing and refusing to hold that the intrastate rates prescribed in said proceeding before the Interstate Commerce Commission are broader in their scope than the interstate rates prescribed in said proceeding, and that said orders of said Commission prescribing said intrastate rates are consequently unlawful.

34. In holding that the proceeding before the Interstate Commerce Commission was one in which a burden by the State rates on the revenues of the carrier was made an issue so that the Commission could properly so find and on that ground prescribe an intrastate rate.

35. In failing and refusing to hold that the question of whether or not the jurisdictional facts exist which warrant the Interstate Commerce Commission in invading the domain of the State of Florida is a judicial question which the Court was bound to determine for itself in this cause, and in failing and refusing to determine the existence or non-existence of such jurisdictional facts independently of any determination thereof by the Interstate Commerce Commission.

36. In failing and refusing to find that the complainants were entitled to a trial de novo by the Court upon the jurisdictional facts which would warrant the Interstate Commerce Commission in invading the domain of the State of Florida by said reports and orders of said Commission, and in failing and refusing to grant such trial upon such facts.

37. In holding that when the question of the existence of the facts with respect to intrastate rates upon the existence of which the power of the Interstate Commerce

Commission to act depends, has been tried before that Commission its conclusion affirming the existence of those facts is sufficient to put the burden upon those who deny it.

38. In holding with respect to the power to deal with intrastate rates "that under the enlarged and positive powers with which the Interstate Commerce Commission is vested its findings of fact within the scope of its powers will not be rejected by the Courts if supported by evidence."

39. In holding that in dealing with intrastate rates a plain case to the contrary of the conclusions reached by the Interstate Commerce Commission is necessary to warrant Court interference.

40. In failing and refusing to find that the report and order of the Interstate Commerce Commission of July 5, 1932, as amended, and the report and order of the Interstate Commerce Commission of January 9, 1933, constitute an unlawful exercise of power by said Commission and are without warrant or authority of law.

41. In failing and refusing to find that the reports and orders of the Interstate Commerce Commission herein involved constitute an unlawful invasion of the sovereign rights of the State of Florida reserved to it under the Constitution of the United States and of the citizens of the State of Florida and are without any warrant or authority of or under the Constitution of the United States.

42. In failing and refusing to find that said Interstate Commerce Commission was and is without jurisdiction to enter said reports and orders herein involved.

43. In holding that the particular findings of the Interstate Commerce Commission are sufficient to support the general finding of unjust discrimination by the state rates against Interstate Commerce by undue burden on the Interstate carrier's revenues, and to justify an order removing the discrimination by establishing the new rate prescribed.

44. In sustaining and upholding the orders of the Interstate Commerce Commission made July 5, 1932, and the order of the Interstate Commerce Commission confirming the same made January 9, 1933.

ARGUMENT

Summary

The questions raised by this appeal are of far-reaching importance. They involve the scope of the exercise of the National and State sovereignty. With due deference, we here express the view that the Interstate Commerce Commission and the trial Court in their decisions have applied to the law and the facts principles which are at variance with the Acts of Congress and with the decisions of this Court.

Briefly stated we have here an order relating to intrastate rates on a single commodity, viz., logs, on a single railroad in Florida, which is statewide in its application without the corresponding interstate rates having ever been established (excepting the interstate rates prescribed for the non-existent log traffic from points in a small portion of that State which portion constitutes the northern fringe or border of that State). The order was entered by the Interstate Commerce Commission at the same time when that Commission had permitted and was then permitting the general level of log rates, interstate as well as intrastate, to become fixed at the level of the Florida intrastate rates superseded by the order. The order was entered

upon the basis of comparisons with log rates which had been and were then being superseded by rates on the same general level as the Florida intrastate log rates affected by the order, and upon the basis of cost evidence which demonstrated only that the Florida intrastate log rates did not produce earnings as great per ton per mile as was the average cost, direct and indirect, including all taxes and profit or return on investment at the rate of 5¾%, of transporting a ton of the **average** of **all** freight a distance of one mile on the entire system of the railroad involved.

The order was entered after a thorough and conclusive demonstration from actual experience during two years of trial (while the former unlawful order was in process of appeal and reversal) that the rates prescribed by the order, being approximately double the Florida intrastate rates theretofore existing, would and will (and largely did) destroy the traffic. The order was made without the making of the findings which this Court has said must be made to support the order. In fact the Commission refused to require the evidence to be produced (although insisted upon by these appellants) to show "the revenue which had been derived by the carrier from the traffic in question." And such findings as were made by the Commission, if indeed they could be called findings at all, relate to the existence of "normal economic conditions" which the Commission did not find to then exist and which this Court has declared it judicially knows did not and do not exist. The domain and rightful province of State authority cannot and ought not to be thus invaded.

Our argument will be set forth under the following headings:

POINT I. On January 9, 1933, and on July 5, 1932, the times at which the Interstate Commerce Commission entered its second and first Reports on the further hearing, there was no substantial disparity between the Cummer Scale of Florida Intrastate Log Rates and the General Level of Interstate Log Rates in the Southern Rate Group, as the Interstate Commerce Commission had permitted and was then permitting such general level to be fixed. During the several months preceding the filing of the Commission's Second Report on Further Hearing the Commission had permitted and was then permitting the General Level of Interstate and Intrastate Log Rates in the predominant part of Southern Territory to be fixed on a substantial parity with that of the Cummer Scale. Hence the Commission was without the power to interfere with the Intrastate Rates in Florida. In attempting to do so its action was arbitrary and unreasonable.

POINT II. The Interstate Commerce Commission has failed to make the basic or essential findings necessary to support a state-wide order prescribing intrastate rates. There is no substantial evidence before the commission to support such findings.

POINT III. There was no finding and no evidence of the amount of revenue which had been derived in the past from this particular traffic in question under the Cummer Scale of rates.

POINT IV. There was no finding as to the amount of revenue which can reasonably be expected to be derived by the carrier from the traffic in question, "Under the Increased Rates".

POINT V. There was no sufficient finding and no evidence upon which the Commission could base a sufficient finding that the alteration of the intrastate rate would produce or would be likely to produce additional income necessary to prevent an undue burden and to maintain an adequate (National) transportation system.

POINT VI. Even if it were possible to find any unjust discrimination against interstate commerce in this proceeding, there is no finding and no evidence upon which the Commission could base a finding that that discrimination was of such character and consequence that it was the affirmative duty of the Commission, as an important step in maintaining an adequate national railway transportation system, to remove it.

POINT VII. The cost and revenue studies founded upon system averages are insufficient to supply the essential facts as to the particular traffic and revenue and the effect of the intrastate rates existing and future upon the income of the carrier.

POINT VIII. The District Court erroneously assumed that the Interstate Commerce Commission had found the average cost of hauling logs over the Atlantic Coast Line Railroad System, whereas the Commission made no such finding and there was no evidence of record upon which such finding could be based.

POINT IX. The rate comparisons furnish no cause for the invasion of State Domain by the Federal Power.

POINT X. The intrastate rates prescribed by the Commission for application in Florida were minimum rates, and not otherwise. The interstate rates prescribed by the Commission for the transportation of logs from points in North Florida to destinations in Georgia were maximum rates, and not otherwise. At no time or place, other than in this proceeding in Florida, has the Commission attempted to prescribe other than maximum rates on logs. The fixing of minimum rates on logs over the Atlantic Coast Line in Florida was arbitrary.

POINT XI. The order of the Interstate Commerce Commission, being state-wide in its scope was beyond the scope of the issue on which the controversy was tried, and the proceeding was not appropriate nor was the hearing sufficient.

POINT XII. The Interstate Commerce Commission has the power to prescribe intrastate rates only when the "jurisdictional facts" authorizing such action have been made to "clearly appear". The existence of such jurisdictional facts is a judicial question which must be determined by the judicial branch of the Government in a proper judicial proceeding, irrespective of any finding which may have been made by the Interstate Commerce Commission.

STATUTES RELIED UPON

The relevant portions of the statutes relied upon are printed in the Appendix of this brief.

POINT I.

On January 9, 1933, and on July 5, 1932, the times at which the Interstate Commerce Commission entered its second and first Reports on the further hearing, there was no substantial disparity between the Cummer Scale of Florida Intrastate Log Rates and the General Level of Interstate Log Rates in the Southern Rate Group, as the Interstate Commerce Commission had permitted and was then permitting such general level to be fixed. During the several months preceding the filing of the Commission's Second Report on Further Hearing the Commission had permitted and was then permitting the General Level of Interstate and Intrastate Log Rates in the predominant part of Southern Territory to be fixed on a substantial parity with that of the Cummer Scale. Hence the Commission was without the power to interfere with the Intrastate Rates in Florida. In attempting to do so its action was arbitrary and unreasonable.

(Applicable to assignments of Error Nos. 1 to 5, both inclusive, and 32 and 33.)

(a) *The Interstate Commerce Commission Could Not and Did Not Make Any Finding of Discrimination Against Persons and Localities.*

The Interstate Commerce Commission has never considered or fixed interstate rates on logs to or from points in Florida except from border points in North Florida to Georgia points. Upon the former appeal, this Court said (Florida v. United States, 282 U. S. 194, text 208):

> "The limitation of the Commission's finding as to interstate rates, and the order prescribing them, to transportation from points in the Northern part of Florida to points in Georgia, defined the interstate commerce which was deemed to be concerned. All of this commerce was potential, no actual movement from Florida to Georgia having been shown. It would be an extreme and unwarranted assumption that to protect this interstate commerce from unjust discrimination as between persons or localities, it was necessary to alter the existing rates for the transportation of logs between all points whatever within Florida."

In its report of July 5, 1932, the Interstate Commerce Commission said (186 I. C. C. 157, text, 189-190):

> "The evidence introduced at the original hearing did not show any actual movement of logs from Florida to Georgia. The then existing in-

trastate rates were more than twice as high as the Cummer scale. The evidence was conflicting as to whether there were logs available in northern Florida that could be economically purchased and transported over defendant's lines to Georgia, but was not convincing that logs could not or would not so move if the interstate and intrastate rates were on the same level. As a result of the former order entered herein the rates from northern Florida to Georgia were reduced and the rates within Florida were increased and both were on the same level from February 8, 1929, to about April 10, 1931. Notwithstanding this parity of rates, it appears from the evidence introduced at the further hearing that there was no movement of logs from Florida to Georgia during that period, except possibly an occasional carload. Whether an interstate movement from Georgia to Florida will develop after the interstate and intrastate rates are again put on a parity and the rate situation finally settled, it is impossible to say at the present time. Inasmuch as we find that the Cummer scale rates cause unjust discrimination against interstate commerce from a revenue standpoint and our order herein removes that discrimination by increasing those rates on defendant's lines throughout the State of Florida to the level of the interstate rates previously prescribed and now in effect, no finding in reference to undue prejudice against persons and localities in interstate commerce is necessary and we make no finding in that regard."

Actually in all these years that this proceeding has been pending and during which there has been so much turmoil with respect to interstate commerce and its protection the record shows that there was no movement of logs in interstate commerce from Florida to Georgia. In the face of the above-quoted language of this Court the Commission could not conclude otherwise than that, "no finding in reference to undue prejudice against persons and localities in interstate commerce is necessary and we make no finding in that regard." So the Interstate Commerce Commission has not sought to justify its invasion of state domain on the ground of discrimination against persons or localities. It founds its invasion solely upon the revenue features of the Interstate Commerce Act as amended by the Transportation Act of 1920 (Section 13 (4) and Section 15a).

(*b*) *The Nature of the Power Here sought to be Exercised by the Commission.*

The power to change State rates in order to remove a revenue burden on interstate commerce is not directly granted to the Interstate Commerce Commission by any section of the Interstate Commerce Act. On the contrary, Section 1 (2) provides specifically that the provisions of the Act shall not apply "to the transportation of passengers or property * * * wholly within one State * * * ".

Section 13 (4) specifically vests the Commission with authority to prescribe intrastate rates where necessary to remove "preference or prejudice as between persons or

localities in intrastate commerce on the one hand, and interstate commerce or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce."

> Section 15 (a) provided that "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a *whole* (or as a *whole* in each of such *rate groups* or territories as the Commission may from time to time designate) will, under honest, efficient and economical management, and reasonable expenditures for maintenance of way, structures and equipment, earn an *aggregate* annual net railway operating income equal, as nearly as may be, to a fair return upon the *aggregate* value of the railway property of such carriers held for and used in the service of transportation." (Italics ours).

Prior to the enactment of these sections which were a part of the Transportation Act of 1920, this Court had held, in the *Shreveport Case*, 234 *U. S.* 342, that the Interstate Commerce Commission had power to remove undue prejudice against persons and localities in interstate commerce. The new act, therefore, simply incorporated in the statute the power as to undue prejudice against persons and localities which the Commission had already exercised and the Court upheld. *Board of Railroad Commrs. v. Great Northern R. C.*, 281 *U. S.* 412.

Nowhere in the Act is the power expressly given to

change intrastate rates in order to remove a revenue burden upon interstate commerce generally. But this Court, in *Railroad Commission of Wisconsin v. C. B. & Q. R. Co.*, 257 *U. S.* 563, held that in view of the purpose of the Act and the impossibility of accomplishing that purpose if State traffic did not contribute its fair proportion to the cost of the maintenance of the national transportation system, the "dove-tail" relation between Section 13 (4) and Section 15a authorized the interpretation that the Commission was thereby vested with power to remove a revenue burden on interstate commerce, caused by State rates.

Thus the necessity to so interpret the Act as to make it workable caused this Court, as said by Circuit Judge Batts, in *Eastern Texas R. Co. et al v. Railroad Commission of Texas, et al.*, 242 *Fed.* 300 (referring to the Shreveport case) "to carry the rules of interpretation to the extreme limit" and, as also said by Judge Batts in the same opinion, "certainly, the authority will not go beyond the necessity."

In considering the revenue powers of the Interstate Commerce Commission in this connection, the Supreme Court in the Florida Log Case (*Florida vs. United States, supra, text* 211), said in part:

> "In construing the statute this Court has held that the general provision of section 13 (4) prohibiting 'unjust discrimination against interstate commerce' and authorizing the Commission to establish intrastate rates to prevent such discrimination, is to be read in connection with Section 15a, both of which were added by Transportation Act, 1920 (secs. 416, 422, 41 Stat. at L. 484, 488).

There is what this Court has called a 'dove-tailed relation between the two provisions. The authority granted by section 13 (4) is thus to be considered in the light of the affirmative duty of the commission to fix rates and to take other important steps to maintain an adequate national railway system.

"As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the Act requires that intrastate traffic should pay 'a fair proportionate share' of the cost of maintenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it." (Wisconsin Passenger Fares Case, 257 U. U. 563; and New York case, 257 U. S. 591).

"The question in the present cases, then is not one of authority, but of its appropriate exercise. The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear. Illinois Central Railroad Company v. State Public Utilities Commission, 245 U. S. 493 * * * supra."

The ultimate "purpose of the Congress" was expressed in Section 15a of the Act and was to maintain an adequate national railway system (Wisconsin Railroad Commission v. C. B. & Q. R. Co. Supra).

Section 15a provided for the recapture of excess earnings from the strong roads and the creation of a general railway revolving fund from which loans and advances might be made to the weak roads. The affirmative duty with respect to fixing rates imposed by Section 15a, related to all carriers as a *whole*, or to all in each rate group as a *whole*, and to *aggregate* income as distinguished from the income of a particular carrier and the recapture clause was the "heart of the plan."

> Dayton-Goose Creek R. Co. v. United States, 263 U. S. 456, text 485.

Shortly after the Transportation Act of 1920 became the law, the Interstate Commerce Commission, with all the rail carriers of the United States before it, determined that in the performance of its duty under Section 15a, the railroads of the nation ought to be divided into four "rate groups" or territories: the Eastern, the Southern, the Western, the Mountain Pacific. The Southern rate group or territory comprised the territory east of the Mississippi River and south of a line drawn approximately westwardly through Richmond, Virginia, and along the Ohio River. It comprised what theretofore had been and still is Southern Freight Classification Territory. 58 I. C. C. 220.

Horizontal increases in freight and passenger fares were allowed at the time of the division into groups in all the groups, 58 I. C. C. 220.

No power or duty to deal with intrastate rates was conferred or imposed by Section 15a. Wisconsin Passenger Fares case, supra. The power of the Federal Commission to deal with intrastate rates arises under Section 13 (4) of the Act, and only then when the disparity between the state and interstate rates is so great and the State rate is so low as to cast a substantial burden upon general interstate commerce and thus interfere with the *"purpose of the Congress"* set forth in Section 15a to maintain a *national transportation system.*

> Wisconsin case, supra; New York v. United States, 257 U. S. 591; Florida log case, supra.

It is only when it "clearly appears" that the interstate traffic is bearing substantially more and the intrastate traffic substantially less than its fair proportionate share of maintaining the national transportation system that the Federal power arises or can be exercised under Section 13 (4) as an incident to the performance by the Commission of its duties under Section 15a.

> New York case, supra; Florida Log case, supra.

(c) *The Log Rates in the Southern Rate Group.*

We propose to examine briefly the status of log rates in the Southern Group. First it must be pointed out that no

general level of interstate rates on logs, either in the group or even any State comprising it, has ever been fixed by the Interstate Commerce Commission. No general investigation upon the subject has ever been had. The most that can be said is that the scale here prescribed for statewide intrastate application in Florida had been "either prescribed or approved" by that Commission in four proceedings involving interstate rates from particular points of origin to particular points of destination (186 I. C. C. 157, text 162).

In its report of July 5, 1932, (186 I. C. C. 157) the Commission compared the Cummer Scale (the Florida intrastate scale of rates) with the scales of interstate log rates of the Seaboard Air Line, the Southern Railway, the Louisville & Nashville, the Illinois Central, and the Mobile & Ohio, as other railroads, and showed that those rates on those other railroads were substantially the same as the rates here prescribed by the order, saying (text 188) that the rates prescribed "are the same or substantially the same as the rates generally in effect and under which logs freely move throughout the South".

It was subsequently demonstrated to the Commission that at or about the time of the making of the order and at or about the time of the making of the order of January 9, 1933, these very same other railroads, among many others, had voluntarily established rates (and the Commission had permitted such rates to become effective) which superseded the rates with which the Cummer scale was compared and which were found by the Commission in its report of January 9th, 1933 (190 I. C. C. 588, text 589)

to be "on substantially the same level as the Cummer Scale".

A great many of these Newly Reduced Rates were shown in the further re-opened proceedings (See R. 1322-1323 for list of tariffs and Exhibit 140 before I. C. C., in separate bound volume, for the tariffs themselves). Notwithstanding this showing the Commission made its report and order of January 9, 1933, affirming its order of July 5, 1932. Thereupon these appellants filed with the Commission their petitions for further consideration and re-hearing (R. 378, 481 and 558) setting forth many additional tariffs publishing these Newly Reduced Rates which tariffs had been published and/or discovered since the last hearing before the Commission. Those petitions were denied February 13, 1933 (R. 1377). A few additional tariffs published and/or discovered since the filing of these petitions were set forth in the supplemental bills and by affidavit with such tariffs attached (R. 571-576U) in connection with the supplemental bills of complaint.

For the purpose of fully informing the Court and dispelling any attempt to minimize the importance or widespread application of these Newly Reduced Rates which may be received from an examination of the report of January 9, 1933, we have tabulated those tariffs, their effective dates and application, as follows:

TABULATION OF TARIFFS PUBLISHING NEWLY REDUCED RATES, THEIR DATE OF ISSUANCE AND APPLICATION.

IN THE SOUTHERN RATE GROUP

Railroad	Tariff No.	Issued	Application
L. & N. R. R.	I. C. C. No. 16022 Supp. 19	Jan. 27, 1933*	Between all stations, except on Ala. intrastate traffic and except on traffic from, to or between Ill., Ind., Mo., and/or Ohio.
N. C. & St. L. Ry	I. C. C. No. 3284-A	Aug. 26, 1932	Between all stations.
G. M. & N. R. R.	I. C. C. No. 1137	Mar. 31, 1932	Between all stations.
Ga. & Fla. R. R.	I. C. C. No. 558	May 6, 1931*	Between all stations.

* Effective date.

Railroad	Tariff No.	Issued	Application
Ill. Cent. R. R.	I. C. C. No. 7786 Supp. 3	May 3, 1932	To Corinth, Fernwood, Grenada, Jackson, McComb, Pickens, and Water Valley, Miss., and to Dyersburg and Jackson, Tenn., and to Ponchatoula, La., from I. C. R. R. stations.
Ill Cent. R. R. and Y. & M. V. R. R.	I. C. C. No. 7748 Supp. 5	Dec. 16, 1932	To Tallulah, La., from Ill. Cent. R. R. and Y. M. V. R. R. stations in Miss.
Y. & M. V. R. R.	I. C. C. No. 7848 Supp. 4	Jan. 7, 1933	To Memphis, Tenn., from Y. & M. V. R. R. stations in Miss.
Y. & M. V. R. R.	I. C. C. No. 7313 Supp. 24	Sept. 17, 1932	To Memphis, Tenn., from Minter City, Miss.

Railroad	Tariff No.	Issued	Application
Y. & M. V. R. R.	I. C. C. No. 7810	June 16, 1932	To Charleston, Clarksdale, Gloster, Greenville, Greenwood, Grenada, Hickory, Holcomb, Jackson, Kings, Lambert, Meridian, Natchez, Phillipp, Stevenson, Trotters Point, Vicksburg, and Yazoo City, Miss., from all Y. & M. V. R. R. stations east of the Mississippi River.
Y. & M. V. R. R.	I. C. C. No. 7810 Supp. 5	Oct. 12, 1932	Adds Denham Springs, La., and Tchula, Miss., to list last above.

Railroad	Tariff No.	Issued	Application
St. L.-S. F. Ry.	I. C. C. No. 9195 Supp. 28	Aug. 11, 1932	To Memphis, Tenn.; from St. L.-S. F. Ry. stations in Tenn., and Miss.
St L.-S. F. Ry.	I. C. C. No. 9019 Supp. 17	Aug. 11, 1932	Between all stations in Ala., Fla. and Miss., except not applicable on Miss. intrastate traffic.
M. & O. R. R.	I. C. C. No. B-860	Aug. 23, 1932	To Columbus, Corinth, and Meridian, Miss., and Humboldt and Jackson, Tenn., and Mobile and Whistler, Ala., and Wycliffe, Ky., from M. & O. R. R. stations.

Railroad	Tariff No.	Issued	Application
Sou. Ry.	I. C. C. No. A-10425 Supp. 5	Sept. 23, 1932	To Chattanooga, Tenn., from Sou. Ry. stations in Ala., Ga., and Tenn., and from A. G. S. R. R. stations in Ala. and Tenn., and from C. N. O. & T. P. Ry. stations in Tenn.
Sou. Ry.	I. C. C. No. A-10472	Aug. 12, 1932	To Corinth, Miss., from Sou Ry. stations in Ala., Miss., and Tenn.
Sou. Ry	I. C. C. No. A-10448 Supp. 2	Aug. 12, 1932	To Memphis, Tenn., from Sou. Ry. stations in Miss. and Tenn.

Railroad	Tariff No.	Issued	Application
Sou. Ry. (1)	I. C. C. No. A-10467	July 11, 1932	To Charleston, S. C., from Sou. Ry. stations in S. C. and Ga.
Sou. Ry.	I. C C. No. A-10425 Supp. 7	Dec. 31, 1932*	To Dayton, Tenn., and Fayette, Ala., from Sou. Ry. stations,, and to Knoxville, Tenn., from C. N. O. & T. P. Ry. stations.
Sou. Ry.	I. C. C. No. A-10425 Supp. 6		To Mobile and Selma, Ala., from Sou. Ry. stations; and to York, Ala., from Sou. Ry. and A. G. S. Ry. stations.

(1) Applicable to conduits, cross arms, crossties, fence posts, lumber, paving blocks, piling, poles and timber.

Railroad	Tariff No.	Issued	Application
S. A. L. Ry.	I. C. C. No. A-7638	Sept. 9, 1932	To Montgomery, Ala., from S. A. L. Ry. stations in Ala. and Ga.
S. A. L. Ry.	I. C. C. No. A-7528 Supp. 8	Aug. 10, 1932*	To Boykins, Va., from S. A. L. Ry. stations in Va. and N. C.
S. A. L. Ry.	I. C. C. No. A-7528 Supp. 9	Dec. 11, 1932*	To Norfolk, Va., from Fitz Siding, N. C.
Sav. & Atl. Ry.	I. C. C. No. 115	July 14, 1930*	To Warrenton, Sardis and Newington, Ga., from S. & A. Ry. stations.
Cent. of Ga. Ry.	I. C. C. No. 2851	Aug. 26, 1932*	To Augusta and Waynesboro, Ga. from Cent. of Ga. Ry. stations.

Railroad	Tariff No.	Issued	Application
Cent. of Ga. Ry.	I. C. C. No. 2848	Aug. 11, 1932	To Montgomery, Ala., from Cent. of Ga. Ry. stations in Ala. and Ga.
Cent of Ga. Ry.	I. C. C. No. 2867	Jan. 23, 1933*	To Dothan, Ala., from Cent. of Ga. Ry. stations in Ala., Fla. and Ga.
A. C. L. R. R. (2)	I. C. C. No. 2745	Dec. 10, 1932*	To Montgomery, Ala., from A. C. L. R. R. stations.
A. C. L. R. R. (2)	I. C. C. No. 2745 Supp. 1	Dec. 10, 1932*	To Charleston, S. C., from A. C. L. R. R. stations in S. C.
A. C. L. R. R.	G. F. O. No. 256	Dec. 5, 1932	To West Marion, S. C. from A. C. L. R. R. stations.

(2) Applicable to cross arms, cross ties, lumber, piling, poles and timber not otherwise specified.

Railroad	Tariff No.	Issued	Application
C. & G. Ry.	I. C. C. No. 36 Supp. 6	June 6, 1932	To Columbus, Greenville, Greenwood and West Point, Miss.; from all C. & G. Ry. stations to distance of 100 miles.
C. & G. Ry.	I. C. C. No. 36 Supp. 8	Aug. 5, 1932	To above listed stations from all C. & G. Ry. stations to 170 miles.
G. & S. I. R. R.	I. C. C. No. 7789	Apr. 15, 1932	To Jackson and Laurel, Miss., from G. & S. I. R. R. stations.
Miss. Cent. R. R.	No. 780-E	Aug. 10, 1928	To Bude and Hattiesburg, Miss., from Miss. Cent. R. R. stations.

Railroad	Tariff No.	Issued	Application
T. A. & G. Ry.	I. C. C. No. A-659 Supp. 115		To Chattanooga, Tenn. and Gadsden, Ala., from T. A. & G. Ry. stations.
W. Ry. of Ala.	I. C. C. No. A-129	Sept. 9, 1932	To Montgomery and Selma, Ala., from W. Ry. of Ala. stations.
N. & S. R. R. (3)	I. C. C. No. A-760	May 15, 1931*	To Norfolk, Va., from N. & S. R. R. stations.
N. O. & N. E. R. R.	I. C. C. No. 3101	June 24, 1932	To Laurel, Miss., from N. O. & N. E. stations.
St. L. S. W. Ry.	I. C. C. No. 4676	July 22, 1932	To Memphis, Tenn.
C. R. I. & P. Ry.	I. C. C. No. C-12130 Supp. 9 and 10	Sept. 28, 1932	To Memphis, Tenn.

(3) Applicable to lumber, piles and other forest products.

IN THE SOUTHWESTERN RATE GROUP

Railroad	Tariff No.	Issued	Application
C. R. I. P. Ry.	I. C. C. No. C-12130 Supp. 9 and 10	Sept. 28, 1932	Between all stations in Ark and La.
Mo. Pac. R. R.	I. C. C. No. A-7348 Supp. 12	Mar. 2, 1932	Between all Mo. Pac. R. R. stations in La., except Gouldsboro, Gretna, Harvey, Marrero, New Orleans, Westwego and Westwego Elevators.
Mo. Pac. R. R.	I. C. C. No. A-7349 Supp. 15	Aug. 1, 1932	Between all Mo. Pac. R. R. stations in Missouri in interstate traffic.

Railroad	Tariff No.	Issued	Application
Mo. Pac. R. R.	I. C. C. No. A-8163	July 5, 1932	Between all Mo. Pac. R. R. stations in Arkansas.
Mo. Pac. R. R.	I. C. C. No. 8018 Supp. 6	July 18, 1932	Between all Mo. Pac. R. R. stations in Ark., Louisiana (with few exceptions), Mo. (with few exceptions), Oklahoma and Texas in interstate traffic.
St. L.-S. F. Ry.	I. C. C. No. 9640	July 22, 1932	Between all St. L.-S. F. Ry. stations in Missouri.
St. L.-S. F. Ry.	I. C. C. No. 9638	July 22, 1932	To Cape Girardeau, Mo., from stations in Arkansas and Missouri.

Railroad	Tariff No.	Issued	Application
St. L.-S. F. Ry.	I. C. C. No. 9346 Supp. 17	July 19, 1932	Between all stations in Ark., and on interstate traffic between all stations in Ark. and Mo.
St. L.-S. F. Ry,	I. C. C. No. 9642	Jan. 31, 1933	To Fayette Jct., Fayetteville and Ft. Smith, Ark., from stations in Ark. and Mo., and from Cedars, Okla.
St. L. S. W. Ry.	I. C. C. No. 4676 Supp. 3	July 22, 1932	Between all stations in Ark., La. and Mo.
Y. & M. V. R. R.	I. C. C. No. 7811	June 17, 1932	Between Y. & M. V. R. R. stations West of Mississippi River in Louisiana.

(Record References: R. 378-383, R. 343-345, R. 357 and 413, R. 576A-576U, and Ex. 140 before I. C. C. which is in separate bound volume of record).

The maps (R. 388 and 490) attached to the supplemental bills of complaint of the State of Florida and of the Wilson Cypress Company and Wilson Lumber Company, as Exhibit "D" of those bills respectively, show graphically the widespread application of these Newly Reduced Rates, both in Southern and Southwestern territory. They are applicable, in intrastate and interstate commerce, in Florida upon four railroads. They are applicable on twenty-two railroads, in intrastate and interstate commerce, in the Southern Rate Group and in every State in that Rate Group except West Virginia. They are applicable on five railroads, in intrastate and interstate commerce, in five States in the Southwestern Rate Group. They are applicable over substantially all of the lines of the Louisville & Nashville Railway, which is controlled through stock ownership by the Atlantic Coast Line Railroad, and over the entire lines of the Nashville, Chattanooga & St. Louis Railway, which in turn is controlled through stock ownership by the Louisville & Nashville Railway.

The Cummer Scale is a mileage scale of rates expressed in lump sum terms per car of the minimum weight of 50,000 pounds with excess weight charged for in proportion. The charge per hundred pounds under that scale can therefore be readily determined.

The rates of the Southern Railway to Charleston, S. C., the rates of the Seaboard Air Line to Boykins and Norfolk, Va., the rates of the Central of Georgia Railway to Augusta and Waynesboro, Ga., the rates of the Atlantic Coast Line to Montgomery, Ala., and Charleston, S. C., and West Marion, S. C., the rates of the Norfolk & Southern Railroad to Norfolk, Va., the rates of the Savannah & Atlanta Railway

to Warrenton, Sardis and Newington, Ga., and the rates of the Georgia & Florida Railroad applicable over its entire lines, are expressed in cents per hundred pounds or in cents per car of a certain minimum weight with excess in proportion and thus are demonstrated by a simple comparison to be upon substantially the level of the Cummer Scale. The rates published by all the other tariffs above referred to are published as a mileage scale on the basis of a lump sum return per car regardless of weight. Most of the rates so published are upon the following basis, viz:

Distance	Rate Per Car Regardless of Weight.
25 miles and less	$12.00
50 miles and over 25 miles	15.00
75 miles and over 50 miles	17.50
100 miles and over 75 miles	20.00

The table below compares the charges for hauls up to 100 miles, per car of the weight mentioned, for the transportation of logs: upon the Cummer Scale intrastate in Florida (Column 2); upon the Newly Reduced Rates (Column 3); and upon the scale prescribed by the Interstate Commerce Commission intrastate in Florida herein (Column 4):

(1) Hauls in Miles	(2) Cummer Scale	(3) Newly Reduced Rates	(4) Scale Fixed by I. C. C.
Computed on Carload of 80,000 pounds			
25 miles	$13.68	$12.00	$28.00
50 miles	16.80	15.00	36.00
75 miles	18.40	17.50	44.00
100 miles	20.80	20.00	48.00

Computed on Carload of 90,000 pounds			
25 miles	15.40	12.00	31.50
50 miles	18.90	15.00	40.50
75 miles	20.70	17.50	49.50
100 miles	23.40	20.00	54.00
Computed on Carload of 100,000 Pounds			
25 miles	17.12	12.00	35.00
50 miles	21.00	15.00	45.00
75 miles	23.00	17.50	55.00
100 miles	26.00	20.00	60.00
Computed on Carload of 110,000 Pounds			
25 miles	18.81	12.00	38.50
50 miles	23.10	15.00	49.50
75 miles	25.30	17.50	60.50
100 miles	28.60	20.00	66.00
Computed on Carload of 120,000 Pounds			
25 miles	20.52	12.00	42.00
50 miles	25.20	15.00	54.00
75 miles	27.60	17.50	66.00
100 miles	31.20	20.00	72.00

It will thus be observed that on a car of 80,000 pounds the Cummer Scale at the distance mentioned is slightly higher than the Newly Reduced Rates and that the Newly Reduced Rates are less than half of the rates prescribed by the Interstate Commerce Commission. On a car of 120,000 pounds the Cummer scale is from 156% to 174% of the Newly Reduced Rates and the rates which the Interstate Commerce Commission has prescribed for application in Florida are from 350% to 377% of the Newly Reduced Rates.

With reference to the weights of cars under the Newly Reduced Rates we quote the following from the report of January 9, 1933, of the Interstate Commerce Commission (190 I. C. C. 588, text 593):

> "The parties are in agreement that the tendency of rates per car regardless of weight is to increase the loading of the cars. The Florida interveners show that since the establishment of these per car rates the mill at Chattanooga, referred to above, will accept only cars that have a loading capacity of about 125,000 pounds and that its average loading ranges from 105,000 to 110,000 pounds; and that mills at Montgomery and Memphis have received cars loading over 90,000 pounds and a mill at Laurel has received cars loading as high as 122,000 pounds."

The supplemental bill of complaint modestly asserts that loading of logs in the Southeastern States, including Florida, upon lump sum per car weights regardless of weight would substantially exceed 70,000 pounds per car and would average from 75,000 to 85,000 pounds per car or more (R. 355). The evidence before the Interstate Commerce Commission sustains this and there can be no dispute upon this subject (See also R. 1325-1347, being list of shipments of cars containing over 70,000 pounds each of logs to Wilson Cypress Company, Wilson Lumber Company and Putnam Lumber Company during two year period of the higher rate although there was then no inducement to load over 40,000 pounds to the car).

The Interstate Commerce Commission is thus well justified in finding that these Newly Reduced Rates are "on substantially the same level as the Cummer Scale".

If, as the Interstate Commerce Commission stated on July 5, 1932, without any evidence to that effect in the record, logs were "freely" moving "throughout the South" upon rates the same or substantially the same as those prescribed by its order here involved, it is difficult to understand why nearly all of the major railroads in the South should at or about that very time, voluntarily and with the permission of that Commission, reduce their rates to the level of the Cummer Scale. The rates so reduced were the very ones with which the Cummer Scale was compared. Obviously logs were not freely moving at the high rate, and we shall hereinafter demonstrate by the havoc and destruction wrought upon employment and investments in the once-great lumber industry in Florida by two years enforcement of that high rate there—the enormous losses which were taken rather than to pay the high rate—that logs never have and never will move under the rate here prescribed.

(d) *The Attempt of the Interstate Commerce Commission to Differentiate Between the Newly Reduced Rates in the Southern Rate Group and the Rates Properly Applicable in Florida.*

The Interstate Commerce Commission in its report of January 9, 1933, attempts to make some point of the fact that some of these Newly Reduced Rates are

transit rates, saying (text 592) that "while these rates standing alone would not be attractive to these carriers from a revenue standpoint, they are attractive when coupled with the rates for the outbound movement of the manufactured product."

In attempting to make this distinction between the Newly Reduced Rates and the Cummer scale, the Interstate Commerce Commission has ignored the fact that it refused to receive the evidence to show that no such distinction could be drawn. The record before the Interstate Commerce Commission shows (R. 960) that the Florida lumber companies who were interveners in this proceeding offered to prove that in practical operation and effect the Cummer scale as applied in Florida was tantamount to a transit scale in that the Atlantic Coast Line Railroad got the outbound movement of lumber under the Cummer scale. The Atlantic Coast Line Railroad objected to this testimony. The Examiner of the Interstate Commerce Commission sustained that objection and refused to receive that evidence (R. 960). The offer was later repeated for the same purpose and again refused (R. 991-992). And again when the traffic manager of the Atlantic Coast Line Railroad was on the witness stand in the re-opened proceeding the interveners on cross-examination offered to prove the same thing by him and to prove that he had testified to that effect in another proceeding, and again that testimony was refused (R. 1066-1067).

Yet having refused to receive this testimony showing that the Atlantic Coast Line received the outbound movement of manufactured products under the applica-

tion of the Cummer scale the Interstate Commerce Commission nevertheless tries to distinguish between the Cummer scale and these Newly Reduced Rates by asserting that these Newly Reduced Rates for the most part require the outbound shipment of manufactured products to be made over the lines of the carrier which moves the logs to the mill and asserting that these Newly Reduced Rates are attractive when coupled with the rates for the outbound movement of the manufactured product. The action of the Interstate Commerce Commission in refusing this proof and then reaching this conclusion is not only inconsistent but seems to us arbitrary and unreasonable.

But this is beside the point. Disregarding the fact that many of the Newly Reduced Rates contain no provision as to the outbound product, we call attention to the fact that Section 15a of the Interstate Commerce Act as amended is concerned with "the aggregate" income of all the carriers "*in the rate group*". If any carrier in the Southern group receives the outbound traffic "the purpose of the Congress" is satisfied. So if the distinction could be made by reason of the arbitrary refusal of the Commission to refuse the evidence, it is a distinction without a difference.

Again the Commission refers to the fact that many of the Newly Reduced Rates were published in order to meet truck competition, and asserts that there is but little competition between the Atlantic Coast Line Railroad and trucks for the movement of logs in Florida for distances over 25 miles and (text 598) says,

> " * * * in the judgment of defendant's responsible traffic official, it is not of sufficient importance to warrant the establishment or maintenance of subnormal rates in an effort to regain it."

Without examining the record which shows that Florida has as good highways as the other Southern States and we think shows as much truck competition in Florida as elsewhere, we remind the Court that the order of the Interstate Commerce Commission in this proceeding is asserted to have been based upon the revenue needs for the maintenance of an adequate transportation system and that there is no difference in the results so far as those revenue needs and the maintenance of that system is concerned whether a low rate is in effect for the purpose of meeting truck competition or for some other purpose. The low log rates were and are generally in effect and their result in this respect is the same regardless of the *motive* of their origin.

The report of January 9, 1933, of the Interstate Commerce Commission asserts that the transportation conditions are not substantially similar throughout Southern territory, and asserts that this was pointed out in the report of July 5, 1932, and likewise refers to the fact that in certain other proceedings arbitraries, or higher charges, have been permitted for the transportation of certain commodities in the Florida peninsula, which arbitraries were in two particular instances as much as approximately forty per cent. higher than the remainder of Southern territory. This proceeding is the

first time that Commission has ever suggested an arbitrary ranging from one hundred per cent. to more than three hundred and fifty per cent.

The only difference which that report points out between transportation conditions in Florida and elsewhere where these Newly Reduced Rates are in effect, is the fact that the Interstate Commerce Commission in other proceedings has in a few instances permitted higher rates in the Florida peninsula. The instances referred to relate to interstate rates and not intrastate rates which are here involved. In pointing to the proceedings in which such higher rates have been permitted in the Florida peninsula, the Interstate Commerce Commission has picked out the two proceedings in which it has gone to the furtherest extreme in that respect. In other proceedings no such arbitraries have been permitted or prescribed. (See for instance, Fertilizer Case, 113 I. C. C. 389).

The fact that the Interstate Commerce Commission has in some proceedings permitted no arbitraries for the interstate transportation to and from the Florida peninsula and in others has permitted as much as forty per cent. is indicative that in dealing with the particular rates therein involved that Commission has considered the transportation conditions surrounding the particular traffic involved. But no such treatment has been accorded to the log traffic in this report. The only testimony upon the subject is that of Mr. True, secretary of the Southern Cypress Manufacturers Association, who has had thirty years' experience in traffic work in connection with the transportation of lumber and who made

a special investigation upon this subject in many of the localities in the Southern territory where the Newly Reduced Rates are applicable. He said (R. 945):

> "The conditions under which logs are loaded onto railroad cars and transported into the mills at Jacksonville, Memphis, Montgomery, Laurel, and Chattanooga, are practically identical with the exception that the transportation conditions around Chattanooga are less favorable, due to the topography of the country and the fact that the logs originate mostly on dead-end branch lines, whereas most of the logs over the Coast Line into Jacksonville originate on the main line in level country where the operating conditions are quite favorable."

He had already testified (R. 944) that the log movement into Chattanooga was for the most part over dead or branch-end lines, in highly mountainous sections where there were either heavy grades or sharp curves or both. He also testified (R. 945) that the topographical conditions in the territory along the Mississippi River in Arkansas and Mississippi are generally less favorable than over the Atlantic Coast Line Railroad into Jacksonville, and that there was little difference between the situation at Jacksonville and that at Montgomery, with the exception that the logs into Montgomery originated on dead or branch lines for the most part. He also testified that there was no difference in the physical operation of terminals (R. 945).

Mr. F. S. Buffum, president of the appellant F. S. Buffum Company, Inc., who operates a lumber mill in Jacksonville, and who has been in the lumber business for thirty-five years, also visited the territory within which the Newly Reduced Rates are applicable shortly before the hearing in the re-opened proceedings. He testified (R. 965) that the method of loading and unloading cars is practically identical throughout the South and Southwest, except that under these Newly Reduced Rates the weight of the average loading has been materially increased. He likewise testified as to the topography of the country in which the Newly Reduced Rates were then applicable (R. 965-967), and showed it to be less favorable than conditions surrounding the transportation of logs in Florida.

This testimony was not contradicted by anyone, nor did anyone else testify with respect to the transportation conditions in the territory where the Newly Reduced Rates are applicable.

The report of the Interstate Commerce Commission of January 9, 1933, refers to the previous report of July 5, 1932, in which it says that it has found that transportation conditions in Florida are not as favorable as elsewhere. In that report it found that transportation conditions in Florida were less favorable than they *were on the lines of the Atlantic Coast Line Railroad outside* of Florida, and this conclusion was based upon two things: first, that the density of traffic—not the density of log traffic, but the density of all traffic—was less in Florida than elsewhere on the lines of that carrier; and second, that the average cost of handling freight—not logs, but all freight traffic—was greater in Florida than elsewhere on the lines of that

railroad. The reason why the average costs are higher in Florida is that it is a terminal State, that is, there is no interstate traffic passing through the State as all interstate traffic in Florida is either loaded or unloaded there. That loading or unloading is an additional expense which is incurred in the State and thereby increases the average cost there (See for example, R. 905, testimony of defendant's witness).

However, it must here be recalled that we are here dealing with intrastate traffic which begins and ends within the State, and this would be true of any intrastate traffic in Florida or in any other State. Hence, the fact that Florida is a terminal State has no bearing here.

With respect to the density of the traffic—as applied not to the whole traffic, but to the log traffic itself—the report of July 5, 1932, shows (186 I. C. C. 157, at page 166) that in 1928 (the year before the former order of the Commission became effective), more than one-half of all the log traffic the Atlantic Coast Line Railroad had was in Florida, although not more than forty per cent. of the system mileage was in Florida (186 I. C. C., p. 164), and the actual density of the log traffic was therefore greater in Florida than elsewhere on the system.

Furthermore, the record does not disclose the density of traffic on the railroads which have established the Newly Reduced Rates at all. It is not known whether the density of traffic on those railroads is any greater or as great as the density of traffic on the Atlantic Coast Line Railroad in Florida, if density of traffic is material to the subject here involved.

We have asserted in the supplemental bills that trans-

portation conditions for the transportation of logs are as favorable or more favorable in Florida than they are elsewhere in Southern territory where these Newly Reduced Rates are in effect. The record before the Interstate Commerce Commission sustains that assertion without contradiction.

(e) *There was no "Substantial Disparity" Between Interstate and Intrastate Rates Upon Which the Commission Could Act.*

There has been no change in the boundaries of the Southern rate group since it was designated by the Commission pursuant to Section 15a. We have demonstrated that at or about the very time the Commission made its reports and orders here involved it was giving its acquiescence and tacit approval to the Newly Reduced Rates which are as low as, or lower than, the Cummer Scale in Interstate Commerce between nearly all of the states in the Southern group. The standards by which the Commission unfavorably measured the Cummer Scale were swept away. We have shown that in most of those states most of the railroads have established in intrastate commerce (as well as interstate commerce) those new rates during that same period. The record shows that the Commission was permitting this to be done at the very time when it was attempting to increase the Florida intrastate rate to more than double what has become and is becoming the general level of interstate and intrastate rates in the Southern and Southwestern rate groups. The record shows that more railroads throughout this and adjoining

groups each month were establishing the newly reduced rates in interstate commerce and in intrastate commerce. We again assert that the general level of log rates in the Southern group has become that of the Cummer Scale or its equivalent, or lower.

This is a case involving intrastate rates on a single commodity on a single railroad within and throughout a single State where the Commission has never made any findings or orders with respect to the corresponding interstate rates, either from all of the State or for all of the railroads within any portion of the State or for the railroads as a body in the rate group, and where the general level of the rates on the commodity in the rate group, as voluntarily established by the railroads and permitted by the Commission, is substantially the same as the intrastate rate which the Commission seeks to supersede by its order. Not even on the Atlantic Coast Line Railroad has the Commission ever fixed interstate rates on the commodity except from the small portion of Northern Florida where no logs ever moved in interstate commerce.

We know of no case where an order of the Interstate Commerce Commission with respect to intrastate rates has been sustained upon any theory except that the order was raising the level of the intrastate rates to the general level of the interstate rates which were found to be discriminated against. Here there is merely an inquiry into the reasonableness of a particular intrastate rate, a declaration of its unreasonableness, and a determination therefrom that it discriminates against interstate commerce as such.

This Court has clearly pointed out the character of discrimination against interstate commerce which justifies the invasion of the domain of the State by the Interstate Commerce Commission to fix State rates.

In four cases this Court has directly considered this power of the Commission and the circumstances under which its exercise will be sustained. The first two of these were the cases in which the rule was announced, *Wisconsin Railroad Commission v. C. B. & Q. R. Co., supra*, and *New York v. United States, supra*. The third case was this *Florida Log Case*, in which the Court set aside the previous order of the Commission in this proceeding. The fourth case was *United States v. State of Louisiana*, ... U. S. ..... (not yet reported) (decided November 6, 1933). In the Wisconsin and New York cases, where the rule was first laid down, and in the more recent Louisiana case, it was shown that the Interstate Commerce Commission, in the performance of its duties under Section 15a of the Act, had prescribed a general level of rates for interstate application of carriers in the *rate group* and that the state authorities of Wisconsin, New York and Louisiana had declined to permit the rates applicable to State traffic to be brought up to the level so prescribed.

In sustaining the order of the Commission in the *Wisconsin Case* the Court said, *257 U. S., text 590*:

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of

> intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to *substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce*, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce." (Italics supplied)

At other places in the opinion in the *Wisconsin Case* the Court stated that the Interstate Commerce Commission's authority to control intrastate rates arises only where such control is necessary to the "efficient regulation of interstate commerce", and only where "there is demonstrable injury and restraint upon interstate commerce which is real and substantial".

When the Court came to consider the previous order of the Commission in this Florida Log case it found a different situation. The Interstate Commerce Commission had made no general investigation nor had it fixed a general level of rates. It acted only upon the rates of the Atlantic Coast Line on logs from north Florida to Georgia and within Florida. It fixed interstate rates only from a limited territory in Northern Florida into Georgia. It originally undertook to predicate its order upon an alleged finding of discrimination between persons and localities but sought to buttress this by a finding of unjust discrimination against interstate commerce generally. It was there urged upon this Court that if any burden

existed against interstate commerce because of the effect upon revenues of the Florida rates, that such burden was not sufficient to be a real obstruction to interstate commerce and therefore did not come within the rule laid down by the Court when it first interpreted the Act so as to give the Commission the power to deal with State rates in order to remove a revenue burden on interstate commerce. The Court held that there were no findings made by the Commission sufficient to sustain its order. The Court expressly held that this defect was not procedural, but that there was a want of "basic or essential findings". The Court pointed out that the exertion of the Authority of the Commission to change State rates in order to remove a revenue burden on interstate commerce could only be sustained where such action was necessary to carry out the purpose of the Act. The Court said, *282 U. S., text 211*:

> " * * * The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principal that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear."

The difference between such a proceeding as the one at bar and one raising intrastate rates generally to the level generally prescribed for interstate commerce was carefully pointed out by this Court in the recent case of

United States et al., v. State of Louisiana, et al., supra. There it appeared that in the *Fifteen Per Cent Case (178 I. C. C. 539; 179 I. C. C. 215)* the Interstate Commerce Commission in a general investigation of freight rates on all commodities throughout the nation had authorized certain surcharges in interstate rates on certain commodities. The Public Service Commission of Louisiana refused to permit the surcharges on intrastate rates in that State, and upon petition and investigation the Interstate Commerce Commission ordered them put into effect in intrastate commerce. The order was attacked as not being based upon sufficient findings. This Court said:

> "This Court has consistently held that this section (Section 13 (4)) is to be construed in the light of section 15a (2) and as supplementing it, so that the forbidden discrimination against interstate commerce by intrastate rates includes those cases in which disparity of the latter rates operates to thwart the broad purpose of section 15a to maintain an efficient transportation system by enabling the carriers to earn a fair return. * * *
>
> "As pointed out in the reports of the Commission in this case and others (see Increased Rates, 1920, 58 I. C. C. 220; New York Passenger Fares, 59 I. C. C. 290), section 15a, by its terms, commands the Commission, in providing the required revenue by increasing rates, to deal with the carriers of the Nation as a whole or in broad classes, and as this Court recognized

in the New England Divisions Case, supra, 197, 198, this requirement would be nullified and the administrative arm of the Commission paralyzed, if instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule."

Further differentiating between the order involved in this surcharge case and the order which the Court had dealt with in the former appeal in this proceeding, the Court said:

"A question different from that before us was presented in Florida v. United States, supra. There the discrimination was essentially one of undue prejudice against shippers, confined by the evidence to rates prevailing in northern Florida. It involved only one railroad and one commodity. It was not the general revenue proceeding authorized by Section 15a. The Court was careful to point out that the Commission had undertaken to establish a state-wide level of intrastate rates without any findings with respect to the corresponding interstate traffic which would tend to support the conclusion that a state-wide alteration of intrastate rates was necessary to protect the interstate commerce involved."

Undoubtedly the "dove-tail" relationship between sections 13(4) and 15a of the Transportation Act under which the Commission has its power to act requires in terms that the revenue needs of the carriers which it is to consider in making rates are the revenue needs of the carriers "as a whole (or as a whole in each of such rate groups as the Commission may from time to time designate)". How can the Commission raise intrastate rates on one railroad in one State to double the level of interstate and intrastate rates under which the traffic moves generally on the railroads in the rate group and be thereby furthering its purpose of maintaining an "adequate national transportation system?" Even if the Commission were authorized to merely find an intrastate rate unreasonable and therefore order it raised, thus assuming "unified control of interstate and intrastate commerce", can it under this authority determine that one railroad is not securing sufficient revenue on a particular intrastate rate and raise it in the interest of the carrier's revenues while at the same time it permits other railroads in the same rate group controlled by stock ownership by the first carrier to maintain the lower rate in interstate and intrastate commerce over their whole lines. The same argument is applicable to all members of the rate group. The Commission entirely ignored the "purpose" of Section 15a which relates to carrier revenues from the group and national standpoint.

Where is the "substantial disparity" between the interstate rates in the group and the intrastate rate operated

upon by the order which it is the purpose of the Commission to circumvent? The Commission was without the power to make the order, and even if it had the power the exercise of it under such circumstances would be arbitrary in the extreme.

POINT II

The Interstate Commerce Commission Has Failed to Make the Basic or Essential Findings Necessary to Support a Statewide Order Prescribing Intrastate Rates. There is No Substantial Evidence Before the Commission to Support Such Findings.

(Applicable to Assignments of Error Nos. 1 to 10 incl., 13, 14, 15, 17 to 24 incl.)

This Court in the *Florida Log Case (Florida vs. United States, 282 U. S. 194, text 215)*, in striking down the former order of the Interstate Commerce Commission in this proceeding, said in part:

> "The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and

to maintain an adequate transportation service.

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this court has recently adverted (Beaumont, S. L. & W. R. Co. v. United States, decided November 24, 1930, 282 U. S. 74, ante, 221, 51 S. Ct. 1), but of the lack of the basic or essential findings required to support the Commission's order * * * ".

The Examiners in their proposed report, being apparently unable to make these findings, and thereby tacitly admitting that the evidence would not support such findings, after quoting the above language from the opinion of this Court, averred (R. 1229-1230):

"A study of the entire opinion, and particularly of the two paragraphs quoted above, shows that the Supreme Court's statement as to the absence of certain findings in the report was made as a suggestion of what might have been appropriate findings to support the conclusion. These suggested findings were merely illustrative; there is nothing in the opinion that would warrant the conclusion that such findings, and no other, were essential preliminary findings of fact."

We took it that when this Court in this very pro-

ceeding plainly stated the findings which were lacking and condemned the order for lack of "the basic or essential findings", it was laying down the fundamental requirements of a valid order in this proceeding and not "suggesting" or "illustrating". The report of the Commission, while making no such assertion, proceeds upon the theory that a valid order can be made in this proceeding without those findings, because it does not make those findings and there was no evidence before it upon which those findings could be made.

We say that under the settled law of this case—the doctrine laid down by this Court upon the appeal in the former case—before the Interstate Commerce Commission can make a valid order affecting intrastate rates in a proceeding of the sort which we have hereinabove shown this to be, there must be findings based upon evidence:

(a) Of the amount of revenue which had been derived in the past by the carrier from the particular traffic in question under the existing intrastate rate; and

(b) Of the amount of revenue which can reasonably be expected to be derived from the traffic in question under the increased intrastate rate which the Federal Commission proposes to establish; and

(c) That the application of the existing intrastate rate results in an impairment of the income of the carrier, which causes an undue burden upon the carrier's interstate

revenues and obstructs the maintenance of an adequate national transportation service; and

(d) That the undue burden and the obstruction so caused is of such character and consequence that it is the affirmative duty of the Federal Commission, as an important step in maintaining an adequate national railway system, to remove that burden and obstruction.

And by those requisite findings referred to in subparagraphs (a) to (d) above, and by the evidence upon which they respectively are based, the justification of the exercise of the Federal power in invading the domain of the State must be made to clearly appear.

The review of the evidence upon which we shall hereinafter embark is extensive and may seem unduly detailed. It is a complete resume of the voluminous record and intended so to be. For we remind the Court, as was said in the case of *Knoxville v. Knoxville Water Co., 212 U. S. 1, text 8*, when the legislative authority of the State in the exercise of its rate-making powers is drawn in question upon constitutional grounds,

> "The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact, the invalidating facts must be proved to the satisfaction of the Court."

In cases of this character, as we shall hereinafter

point out, the Court will examine the evidence for itself, if the order is otherwise supported, and will for itself ascertain that the evidence is clearly sufficient before sustaining the order.

The order of the Interstate Commerce Commission here involved and the record of its proceedings are deficient both as to the basic and essential findings and as to evidence upon which the same could be made. Under this heading the point is made as to ultimate findings and the evidence necessary to support them. Under subsequent headings we point out the deficiencies with respect to the particular findings and the want of evidence to support them.

POINT III.

There Was No Finding and No Evidence of the Amount of Revenue Which Had Been Derived In the Past from this Particular Traffic in Question Under the Cummer Scale of Rates.

(Applicable to assignments of errors Nos. 6, 7, 9, 10, 29.)

The report of the Interstate Commerce Commission does not even purport to find the amount of revenue which was derived in Florida at any time under the Cummer Scale of rates and there is no evidence upon which any such finding could be made.

At the first hearing after the proceedings were reopened the Atlantic Coast Line Railroad filed Exhibit No.

80 in which the carrier purported to show, for the years 1926 to 1930 inclusive, all logs of all tariff descriptions handled on the entire system and in the State of Florida, as measured by the number of cars and number of tons and likewise purported to show the total revenue for the whole system derived from logs of all tariff descriptions. *That statement did not show anywhere or at any time the amount of revenue derived from the transportation of logs in Florida*, the carrier's witness expressing the view that the revenue derived from handling logs was not available for the State of Florida (R. 688). That statement shows that the tons of logs handled by the carrier in Florida in 1926 (the year this proceeding began) amounted to 1,214,361 and the tons so handled in 1930 (the second year of the high rate) amounted to 272,150 (R. 1134 C), but the revenue derived is nowhere disclosed, although the carrier admitted of record (R. 717) that the revenue derived from this traffic in 1926 under the Cummer Scale was greater than the revenue under the high rate in 1930. The appellants pointed out that under the Cummer Scale the movements were in large part long hauls which ran up the general revenue from the logs in Florida far out of proportion to the number of actual cars hauled (R. 718). Counsel for the carrier likewise admitted of record that the amount of revenue which had been derived from the traffic in question during the years preceding the entry of the former order of this Federal Commission could be produced, but refused to produce it upon the theory that it would be troublesome to compile (R. 718-719) and expressed the view that "this question of revenue" was not relevant

to this proceeding (R. 718). And this notwithstanding the plain declaration of the Supreme Court of the United States in this case upon the subject.

The State of Florida asserted (R. 1096) in its Reply to the motion to re-open the proceeding, that the amount of revenue which had been derived annually by the carrier for many years next preceding the institution of this proceeding from its intrastate log traffic in Florida was far in excess of the annual revenue derived from such traffic upon and after the application of the unlawful rate prescribed by the Federal Commission. The State therefore in advance of the hearing in the re-opened proceeding demanded of the carrier that the carrier disclose the amount of that revenue for the record. This the carrier refused to do. The State of Florida then demanded of the Federal Commission that it require that such data be produced. But the Federal Commission refused so to do (R. 80-98). At the first hearing in the re-opened proceeding this demand was again made and insisted upon (R. 715-719), and was referred by the Examiner to the Federal Commission for its ruling upon that demand (R. 719), and in due course the Commission again refused to require its production (R. 1153).

(a) *The Evidence Showing the Number of Cars of Logs Which Moved on the lines of the Carrier in Florida From February 1931 to June 1931 Showed Nothing with Respect to Revenue and Was Wholly Insufficient to Show the Revenue Derived Under the Cummer Scale.*

The Commission in its report in the re-opened proceedings (dated July 5th, 1932, 186 I. C. C. text 188) declares,

> "While the record shows that defendant's Florida log traffic declined considerably after the increase of rates on February 8, 1929, the record further shows that there was no substantial increase in the movement after the Cummer Scale was restored on April 10, 1931."

Since there was nothing else in the record relating to the movement after the Cummer scale was restored, that declaration probably refers to an exhibit filed by the carrier (R. 1180-1181, Exhibit 128), showing the number of cars and the points of origin and destination for the period commencing February 1, 1931, and ending June 30th, 1931, *but showing nothing at all about revenue*. The District Court fell into the same error, saying (4 F. Supp. text 479):

> "Although the traffic fell off greatly during this period (1929 and 1930), it is found to be more due to the universal depression in business and to

the moving of mills to the timber than to the raise in rates, because there was no substantial increase after the Cummer Rates were restored following the decision of the Supreme Court above referred to."

It is manifest that this Exhibit No. 128 is of no value to show even the number of cars which has been transported under the Cummer Scale since its restoration, because the Cummer Scale was recited to have been restored on April 10, 1931. This Exhibit referred to at p. 188 of the report as showing that 2765 cars of logs moved from February to June, 1931, and that therefore "the movement will not be less than this under normal conditions", does not purport to show what part of those cars moved prior to the restoration of the Cummer Scale and what part moved after the Cummer Scale was restored. Further it does not show anything about the revenue that was produced. When the report, at p. 188, says that "there was no substantial increase after the Cummer Scale was restored on April 10, 1931", it makes that statement without one scintilla of evidence to support it.

And indeed, it was shown that the restoration of the Cummer Scale did not take place until on or about April 10th, 1931, and that on or about that date the carrier wrote to various of the log shippers and consignees, informing them that the carrier would transport logs (of the tariff descriptions in question) "presently collecting therefor on the basis" of the Cummer Scale. But in that same letter the carrier advised such shippers

and consignees that "if the scale of rates just referred to is not the applicable rate or rates now in effect, the Atlantic Coast Line Railroad Company will later make demand for revenue based on the applicable rates" (R. 866; R. 1174). So that the restoration of the Cummer Scale under the mandate of this Court was accompanied by the threat to the shippers that additional charges might later be demanded.

(b) *The Evidence in the Second Re-opened Proceeding Respecting the Log Movement, After the Cummer Scale Was Restored, Did Not Show the Trainload Movement of Logs, or the Revenue Received From Any Log Movement.*

In the further re-opened proceeding, that is, several months after the report of July 5, 1932 had been made, the carrier introduced evidence as to the number of carloads of logs (except trainloads) it had moved in Florida in the several months of these years 1930, and 1931, and the first eight months of 1932 (R. 1360-1370). This likewise showed the distances which those logs moved in the period from February, 1931 through August, 1932. Observe however that it expressly omits the movement of logs in trainloads which the carrier could just as easily have shown and the omission of which gives rise to the presumption that the showing of the trainload movements would have been unfavorable to the carrier. Observe likewise that *this* evidence carefully refrains from giving any information

whatever as to revenue. *It gives no information even as to the quantity of the logs which moved in trainloads after the Cummer Scale was restored and it gives no information as to the revenue from any logs which moved after the Cummer Scale was restored.*

It will be observed that the distances travelled by the logs which moved in less than trainloads during the second year of the high rate (February 1, 1930, to January 31, 1931) is set forth in the record (R. 1167-1173), and a computation will show that they travelled an average distance of less than 45 miles, whereas a similar computation will show that the logs which moved in less than trainloads in the first eight months of 1932 travelled an average distance of more than 100 miles. This may have something to do with the failure of the railroad to show anything about the revenue on these logs which moved after the Cummer Scale was restored.

The Interstate Commerce Commission in its report of January 9, 1933 points out (R. 373) that "the main depression in the lumber industry in Florida began about the latter part of 1930". The record shows (R. 1371) that the number of cars of lumber, shingles and lath transported by the carrier from points of origin in Florida during the first eight months of 1930 (before the depression according to the finding) was 12,864, whereas during the first eight months of 1932 (in the depression) it was 4,982 cars, a decline of 61%. Compare this with the portion of the log movement which is shown. In the first eight months of 1930 under the high rate the cars of logs (exclusive of trainloads) moved by the carrier in Florida was 2,146 (R. 1370), in the first eight months of 1932 under the Cummer Scale

it was 1,500 cars, a decline of 30%. Between the two periods the quantity of the lumber traffic in Florida declined more than twice as fast as the quantity of that portion of the log traffic which the record discloses. If the record disclosed the trainload movements of logs under the restored Cummer Scale or if it disclosed revenue at all under the restored Cummer Scale, the comparisons would be more enlightening.

But even this is sufficient to demonstrate that the conclusion of the Commission (R. 375) "that the re-established substantially lower Cummer scale has had no effect on the volume of rail movement" is wholly without foundation in the record. It is not surprising to us that the traffic manager of the carrier when he produced these figures showing the number of cars transported—but not revenue and not trainload movements—since the restoration of the Cummer Scale, stated (R. 1050-1051):

> "I may state that considering the general depression that exists throughout the whole country, and in Florida as well, the small percentage of the falling off in the Florida log traffic was a matter of considerable surprise."

Likewise the Court must remember that throughout this period when the Cummer Scale was restored it was the subject of contention before the Commission. No shipper could rely upon its being maintained for any considerable length of time and make arrangements for handling his logs accordingly or make investments in plant or facilities upon the strength of it until and unless the matter was settled and the threat of the high rate here prescribed re-

moved. Also there was the constant threat, which we have above set forth, on the part of the railroad, that it would undertake to collect the difference between the Cummer Scale and the high rate on all shipments made. Howeyer the important part here made is that never, either before the Cummer Scale was superseded or after it was restored, has the revenue received under it been disclosed—not even for as much as a single day.

(c) *The Evidence Which Was Before the Commission as to the Revenue Under the Cummer Scale Never Showed More Than the Amounts Received from Certain Shippers:*

The only figures as to revenue from the log traffic in Florida which the Commission had before it in making its reports was the revenue derived during the period from February 9, 1929, to January 31, 1931, (all during the period of the high rate and derived under that high rate) and the testimony of a few shippers as to the amounts which they had paid for the transportation of logs under the Cummer Scale. Of course those shippers could not and did not purport to testify as to the total revenue received by the carrier from all of its log business in Florida. However it was shown that one shipper alone paid the carrier $683,744.29 for hauling its logs in Florida in 1927 and 1928 under the Cummer Scale (R. 766), whereas the total revenue of the carrier from all of its log business in Florida in the two years of the high rate (Feb. 9, 1929, to Jan. 31, 1931) was $571,-

508.94 under the high rate (R. 1101). That shipper moved his plant to the woods when the high rate went into effect as he had testified in the former proceeding that he would if the rate were increased (R. 767) and in so doing incurred a loss of $3,244,000 (R. 765). He would not have moved except for the increase in the rates (R. 777).

Thus, we say that the evidence upon which to base the first essential finding prescribed by this Court (viz., the amount of revenue which has been derived in the past by the carrier from the traffic in question) is not only wholly absent from the record in this proceedings, but also that the carrier refused to produce it when demand was made upon it so to do. *And the Interstate Commerce Commission in its report does not even purport to find the amount of revenue that was produced at any time under the Cummer Scale.* Upon this account, if for no other reason, the order of the Interstate Commerce Commission, under the law laid down in this particular case by this Court, is invalid and unlawful.

POINT IV.

There Was No Finding As To The Amount Of Revenue Which Can Reasonably Be Expected To Be Derived By the Carrier From The Traffic In Question, "Under The Increased Rates".

(Applicable to Assignments of Error Nos. 12, 13, 14, 15).

The report of the Commission, dated July 5th, 1932,

sets forth the fact that during the two years in which the high rate was in effect the total movement of logs in Florida was 18,602 cars. It then deducts 3,740 cars which moved in certain trainload movements which have ceased and which the Commission there asserts will not be resumed. It then makes the following observations (p. 188 of the report):

> "*Under normal economic conditions it seems probable* that the annual volume of the Florida log movement under rates the same as those previously prescribed will not be less than the average of this two-year period minus the number of cars included in the discontinued trainload movements. This average is 7,431 cars. That the movement will not be less than this *under normal conditions* is confirmed by the fact during the five months immediately preceding the last hearing in this case, February to June, 1931, when conditions were abnormal, there were shipped over defendant's lines in Florida a total of 2,765 cars of logs. This movement was at the rate of 6,636 cars a year. *We believe* that the movement of logs intrastate in Florida over defendant's lines will not *be materially curtailed* under the rates which we here prescribe, which are the same or substantially the same as the rates generally in effect and under which logs freely move throughoutout the South." (Italics supplied.)

The report then figures the amount of revenue col-

lected on the cars which moved in this two year period and the amount of revenue which would have been collected on the same cars under the Cummer Scale and proceeds at p. 189:

> "Accordingly, on the basis of an average of 7,431 cars a year *under normal economic conditions* which basis *we believe* conservative, the gross revenues under the rates prescribed by the previous order herein would be more than $100,000 a year greater than under the Cummer Scale now in effect." (Italics supplied.)

(a) *The "Finding" With Respect to Future Revenue Was An Indefinite Expression of Belief Contingent Wholly Upon the Existence of "Normal Economic Conditions."*

The finding with respect to future revenue from the proposed increased rates is utterly insufficient. It will be noted that the finding with respect to the revenue to be expected from the traffic in question under the increased rate is based wholly upon what "it seems probable" may be expected "under normal economic conditions".

There is no substantial evidence in the record to support the estimate of the number of cars which may move under normal conditions. But putting that on one side, we point out that the Commission here speaks without conviction and without certainty, and does not purport to

make "findings" in any sense of the word. In the *Illinois Central Case, 245 U. S. 493*, at page 510, this Court said that an order of the Commission should not be given precedence over a State rate otherwise valid, "unless, and except so far as, it conforms to a *high standard of certainty*." (Italics supplied.) These doubtful and ambiguous conjectures cannot be considered as conforming to a "high standard of certainty."

Observe likewise that every one of these indefinite expressions of belief is applicable only "under normal economic conditions". The Commission in its reports of July 5, 1932, and January 9, 1933, is prescribing a rate for present application and not a rate to become effective upon the return of Normal Economic Conditions. We have had no "normal economic conditions" in Florida for many years, and one of the contributing factors to our having no "normal economic conditions" has been the former order in this proceeding of the Commission. Certainly the report does not even purport to predict when "normal economic conditions" will prevail, nor does it make the effectiveness of its orders contingent upon the return of those normal economic conditions. The quotation we have above set forth recognized that conditions were abnormal in the period from February to June, 1931. Does the Commission find that conditions on July 5, 1932, and January 9, 1933, when it was promulgating its order, are any less abnormal? It is prescribing a rate for present application which it does no more than attempt to justify under "normal economic conditions."

No longer ago than January 4, 1932, this Court considered conclusions based on normal economic conditions

for application in the present day. That was in the case of *Atchison, T. & S. F. Ry. Co. vs. United States, 284 U. S. 248.* There the Commission had made a general investigation of grain rates in Western territory. The record was closed in September, 1928 and the matter submitted on July 1, 1929 to the Commission for its decision. The Commission made an order on July 1, 1930, effective October 1, 1930, which effective date was subsequently postponed. A petition for rehearing by the carriers was denied in November, 1930 and they filed a further petition for rehearing in February, 1931 setting up the changes in economic conditions and in their own condition and in the traffic which had occurred in all this intervening time. This second petition for rehearing was denied and this Court, speaking through Mr. Chief Justice Hughes, declared the denial of that petition was "a denial of right" and that the Order of the Commission therefore could not be sustained. In the course of the opinion the Court said; text 260:

> "There can be no question as to the change in conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstanding contemporary fact, dominating thought and action throughout the country.
>
> * * * *
>
> "It is plain that a record which was closed in September, 1928—relating to rates on a major description of the traffic of the carriers in a vast territory—.....—cannot be regarded as

representative of the conditions existing in 1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements. * * * It is said that 'in performing its legislative function of prescribing reasonable rates, the Commission necessarily projects into the future the results of a decision based on the conditions disclosed in the record' and that its determination 'cannot reflect accurately fluctuating conditions.' These suggestions would be appropriate in relation to ordinary applications for rehearing, but are without force when overruling economic forces have made the record before the Commission irresponsive to present conditions. *This is not the usual case of possible fluctuating conditions but of a changed economic level.*" (Italics supplied.)

From the foregoing quotation it is readily apparent that this Court would not consider even a definite finding if based upon "normal economic conditions" appropriate to abnormal conditions, even if there were evidence upon which such a finding could be made, which we deny. The standards of 1928 will not do for 1931, said the Court, and we assert that it is even more true that the standards of 1929 will not do for 1932 and 1933.

(b) *There Was No Evidence Upon Which a Finding Could Be Made as to the Revenues To Be Expected Under the Increased Rate, Except a Finding That Such Revenues Would Be Trifling and Inconsequential.*

Nor was there any evidence upon which any finding could be made as to the amount of revenue which could reasonably be expected to be derived by the carrier from the log traffic under the increased rates. The Commission to confirm what the movement would be in normal times, recites in its report dated July 5, 1932 (text 188) that 2,765 cars moved over the lines of the defendant carrier between February and June, 1931, when conditions were abnormal. We have pointed out that during that particular period the Cummer Scale and the rate prescribed by the Interstate Commerce Commission were each in effect about one-half the time, and there is nothing to show how many cars of logs moved under the one or the other, or what the revenue was under the one or the other.

At this same place in its report dated July 5, 1932 (text 188) the Commission expressed the belief that the log movement in Florida would not be materially curtailed under the prescribed rate, which, said the Commission, "are the same or substantially the same as the rates generally in effect, and under which logs freely move, throughout the South". In that report of July 5, 1932, the Commission overlooked what it recognized in

its report of January 9, 1933, that many if not most of the carriers throughout the South with whose rates the Commission had compared the Cummer Scale were then publishing or preparing to publish rates which in practical operation and effect were substantially upon the level of the Cummer Scale, in an attempt to attract the log traffic to their lines. Thus, the second report of the Commission on the further re-opened proceeding, filed January 9, 1933, demonstrates that logs will not move freely in the South at a scale substantially in excess of the Cummer Scale, a thing testified to in the original proceedings, recognized by this Court in its opinion in the Florida Log Case, (supra), and demonstrated by the record in the re-opened proceedings before the Commission to be the experience of all concerned during the two year period when the unlawful order, dated August 2nd, 1928, of the Interstate Commerce Commission was in force and effect.

It is difficult to understand how any such statement could be made in the report of the Interstate Commerce Commission, as that the log movement would not be materially curtailed under the prescribed rate.

(1) *The Evidence With Respect to the Large Shippers Who Testified in the Former Proceedings, and the Effect Upon Them and Their Shipments of the Orders of the Commission.*

We propose to examine the record as briefly as we

can upon the subject. We have shown that there was no evidence of the amount of revenue produced under the Cummer Scale. The record, does show, however, that there were large, regular trainload movements of logs in Florida prior to the entry of the former order of the Commission and that there was a substantial movement in less than trainloads (Former Record, 513). There is no evidence as to what this movement in less than trainloads amounted to, but we do have some information on the amount of the revenue from certain trainload movements. The presidents of four large lumber companies testified here (Arthur G. Cummer, R. 726; M. L. Fleishel, R. 744; J. S. Foley, R. 765; and C. R. MacPherson, R. 778). Those companies were: Cummer Cypress Company, Putnam Lumber Company, Brooks-Scanlon Corporation and Wilson Cypress Company. They showed that these companies had over a period of many years prior to the former order of the Commission moved large quantities of logs in trainloads in Florida. We shall not burden this brief with a recitation of all the statistics of that trainload movement. It is sufficient here to say that in 1926, the year in which this proceeding was started those four companies paid the following amounts of freight on these log trains:

Cummer Cypress Company	$ 46,506.15	(R. 731)
Putnam Lumber Company	200,014.50	(R. 747)
Brooks-Scanlon Corporation	334,048.47	(R. 766)
Wilson Cypress Company	71,742.75	(R. 779)
Total	$652,311.87	

We have no idea how much other business there was, but in 1926 the railroad actually collected $652,311.87 in Florida from just four companies on trainload movements alone. This Court pointed out in its opinion, *282 U. S., text 214*, that witnesses for the Florida interveners had testified "that any material increase in the Florida intrastate rates would either cause them to move their plants to the timber or abandon operations", and the Court remarked "that in either event the carrier would lose considerable traffic". Those Florida interveners were those same witnesses who testified here, and we can see how their prophecies materialized. Let us see what became of this business.

The Cummer Cypress Company had its lumber mills at Lacoochee. It owned a tract of timber, about 75 million feet, on the lines of the railroad and some 30 miles from the mill. It hauled some logs under the new rate but could not afford to cut the timber clean under that rate. It therefore built its own logging road to a point on the Seaboard Air Line Railroad, a distance of about 14 or 15 miles and effected trackage arrangements with the Seaboard for the remainder of the haul. The cost to the Cummer Cypress Company for the transportation of its logs over its own tram road and over the Seaboard Air Line trackage right is less than the cost would have been under the Cummer Scale. (Cummer, R. 730-732, 743). The Cummer Cypress Company had intended to cut and log and transport all of that timber in trainloads over the Atlantic Coast Line Railroad had it not been for this increase in rates (Cummer, (R. 732). So the railroad lost this traffic because of the Commission's order.

The Putnam Lumber Company had mills at Milldale and Ortega, both suburbs of Jacksonville, Florida. The mill at Milldale was owned by Cummer Lumber Company and operated by Putnam under a lease which ran for successive terms of two years each. Prior to and during 1926 the Putnam interests and the Cummer interests had negotiations under way for the sale of these mills and the timber of the Putnam Lumber Company. The bulk of the timber was located below Perry, Florida, although there was a considerable stand in the vicinity of Volusia County, Florida. These negotiations had been practically completed and the contracts had been prepared, approved and were ready for execution. The purchase price was approximately $12,000,000.00. Meanwhile this proceeding before the Interstate Commerce Commission was started. The purchaser became apprehensive with respect to the log rates and refused to complete the transaction for the *sole* reason that no satisfactory assurance could be had from the defendant Atlantic Coast Line Railroad Company as to log rates for the future and the whole rate question was in the air (R. 746). If the deal had been completed the Denkmann Lumber Company, (the proposed purchaser), intended to transport those logs over the Atlantic Coast Line Railroad Company to the mills at Jacksonville and continue the operations of the Putnam Lumber Company there. The Putnam Lumber Company therefore refused to renew its lease and moved to the woods, building a new mill there. (Cummer, R. 727-728, 732-733, 734-736; Fleishel, R. 745-746).

The result of all this was that the mill at Milldale was junked with a consequent loss to the Cummer Lumber Company of over a million dollars, a great number of men were thrown out of employment and the thriving little community of Milldale was totally wrecked (R. 728-729). The mill at Ortega was dismantled with a consequent loss to the Putnam Lumber Company of over two hundred thousand dollars (R. 747). There were approximately seven hundred men employed in these mills (Former Record, 360). So this traffic has gone likewise.

The Brooks-Scanlon Corporation had its mill at Eastport, a suburb of Jacksonville. It owned about a billion feet of timber in the neighborhood of Perry, Florida. The increased rates prescribed by the former order of the Commission closed that mill down and caused it to be moved to the woods. It stopped shipping logs almost immediately after the new rate became effective. In making the move it suffered a loss of $3,200,000. The dismantling of the mill entirely destroyed the town of Eastport, a town of 5,000 inhabitants. Only about 40% of the men employed there moved with the company to its new location in the timber. (Foley, R. 765-769, 775, 776-778).

While the aggregate annual payrolls of these industries is not set forth in the record, it can be readily estimated to have been of very considerable proportions. No other industries have taken their place, and credible witnesses expressed doubt if the City of Jacksonville would ever be able to build up new industries sufficient to off-set the payrolls and other expenditures made in

that city by those lumber companies (Cummer, R. 729).

Observe what the report (186 I. C. C. 157) has to say about this at pages 169-170. It refers to the fact that these mills in Jacksonville were located about 166 miles from the timber and that there was testimony that it was uneconomical for mills to be located so far from the timber. At the high rate here prescribed it was not only uneconomical—it was impossible. After discussing the movement of the location of the mills and the log movement to Putnam Lumber Company, it says:

> "This movement would have been discontinued even though the Cummer scale had remained in force, since the company had decided to move its mills to the timber prior to the rate increase."

Not one word is said about the undisputed testimony of credible witnesses, showing that if it were not for this proceeding and the former order of the Commission both the Brooks-Scanlon Corporation and a successor of the Putnam Lumber Company would be operating in Jacksonville today. Mr. Foley, the President of Brooks-Scanlon Corporation, testified directly that the move of the location of that company was not occasioned by anything except the order of the Interstate Commerce Commission and had that order not been made and become effective the mill would be operating at Eastport today (R. 777). There was not the slightest contradiction of that testimony, but apparently the Commission overlooked or disregarded it.

We now come to the Wilson Cypress Company which

has stayed in this fight and is before this Court in this litigation. Its mill is at Palatka, Florida, on the St. Johns River. It owns about three hundred million feet of timber on that river which it can move to its mill by water. At the time of the last hearing in this proceeding (July, 1931) it had about fifty million feet in the territory south of Perry which was then being cut and transported because it was owned under a short term lease. It wanted to keep its mill at Palatka so that it could there later cut its river timber. (MacPherson, R. 779-782).

Let us see what the report has to say about this company. At page 174 the report says:

> "Although this intervener, as well as others, testified at the original hearing that it would be impossible to continue the movement of logs over defendant's lines if the Cummer scale were increased, it actually has done so. It appears that under normal conditions it will continue to ship these logs over defendant's line until the timber adjacent to the Perry branch is cut out. Under the normal rate of cutting it appears this would occur in about one and one-half to two years after the time of the further hearing."

Observe that the conclusion is that it will ship logs "under normal conditions". Likewise the cutting would under the normal rate of cutting end, at all events, by July 1933. But the Commission wholly discarded the uncontradicted testimony of Mr. MacPherson, the presi-

dent of the company. He testified that the company continued to haul logs relying upon obtaining justice in the Courts in the former litigation and obtaining restitution of all amounts over the Cummer Scale which it might pay (R. 782). It had some timber that was held under short term leases at that time in West Florida and it had to be cut (R. 780). The company was able to make trackage arrangements with the Southern Railroad and Seaboard Air Line that would have cost about half way in between the Cummer Scale and the higher rates prescribed by the Commission (R. 781). This arrangement was not made because part of the track was not in condition for heavy locomotives (R. 781). These track conditions have been remedied (R. 781). If high rates were prescribed again Mr. MacPherson said he would litigate it again, or make the trackage arrangement or put a small mill in the timber, or sell the timber to some of the mills located near it. (R. 782-783). The President of the Company testified that it would not again ship logs at any rate substantially higher than the Cummer Scale (R. 783). This was in nowise contradicted, but the Commission apparently disregarded it, just as that Commission had disregarded similar testimony in the former proceeding, and concluded that this company would submit to the high rate again, just as in the former proceeding it concluded that the other companies would submit to the high rate.

(2) *The Log Traffic in Florida During the Two Years of the Effectiveness of the Former Order of the Commission.*

We showed that four companies on trainload movements alone paid $652,311.87 for the transportation of logs in Florida in 1926. Let us see what happened after the high rate went into effect. This occurred on February 8; 1929, and the Atlantic Coast Line Railroad Company was obliging enough to furnish a statement of its revenue from that date to January 31, 1931, on logs in Florida and showed the points of origin and destination (Exhibit 61, R. 1101-1109). That exhibit shows that 18,602 cars of logs moved in this period of approximately two years, but it did not show when during that period any of those cars moved. The Florida interveners had a check made to determine when those cars moved and to whom they went. This analysis excludes the Hines to Palatka trainload movement of Wilson Cypress Company which as above shown will not again move under the high rate.

That analysis is in the form of exhibits (See R. 1166a-1174) and deals with the movements to the various destinations. The movements to Eastport were the end of the Brooks-Scanlon Corporation shipments, which we have discussed above. These produced a revenue of $10,403.43 in the first year of the high rate. The movements to Lacoochee and Otter Creek were the conclusion of the Cummer Cypress Company business before its trackage arrangement with the Seaboard Air

Line was made. These produced a revenue of $90,117.09 in the first year of the high rate, and $4,095.26 in the second year of the high rate. Now if we exclude the Wilson Cypress Company trainload movement, which must end shortly at any rate, and which we have shown was only made by reason of abnormal circumstances and even then would not have moved except on the reliance that this Court would do what it did, and exclude the trainload movements of the Brooks-Scanlon Corporation and the Cummer Cypress Company which are admitted to be over, we can see what kind of revenue was produced under the high rate formerly prescribed by the Interstate Commerce Commission.

This leaves us with a total of 4,222 cars moving in the first year of the high rate, and a gross revenue derived therefrom of $101,370.68. It leaves us with a total of 2,973 cars moving in the second year of the high rate, and a gross revenue derived therefrom of $66,179.49. This is what the log business had gotten down to in two years of the high rate. The only conclusion that could be reached is that if this high rate were continued another year or two the railroad would not be hauling a handful of logs in Florida.

(3) *The Effect of the Former Order of the Commission Upon the Traffic of the Carrier in Pine Logs in Florida.*

We desire to present another comparison, well illustrating the arbitrary method in which the Commission

has approached this problem. The report at page 173 avers that pine wood is of primary importance in the Florida lumber industry. This is correct. The average annual production of pine lumber in Florida is from three-quarter of a billion to one billion feet (R. 874). Cypress comes next with an average annual Florida production of about two hundred million feet (R. 874). Hardwood timber grows in small stands interspersed in the pine and cypress tracts, and generally speaking the logging of it, and the logs thereby produced, is incidental to and a by-product of the logging operations of the pine and cypress manufacturers (R. 874, 748). The average annual production in Florida of hardwoods is indeterminate, and probably is not more than five or ten per cent of the pine and cypress produced in Florida (R. 748).

So the Commission has nothing to say about cypress or hardwood but properly devotes some attention to the pine business. At pages 173 and 174 of the report it shows that the Southern Pine Association has estimated that there are over 24 billion feet of pine in Florida. It then refers to the map as showing that the Atlantic Coast Line Railroad "forms a network which virtually covers the State". It then quotes, from Mr. Perrin the freight traffic manager of the Atlantic Coast Line who assumed, without any actual information, that half of all this timber was reasonably adjacent to his railroad, and who then said, "However, if the Atlantic Coast Line can be assumed to transport 40 per cent of the logs to be produced in Florida from timber now standing, it will handle approximately nine billion feet * * *". Mr. Perrin then

computes the difference in revenue on this nine billion feet between the Cummer Scale and the scale prescribed by the Interstate Commerce Commission on an average haul of 81 miles. Neither Mr. Perrin nor the Commission ever anywhere actually assumed that the Atlantic Coast Line would transport 40 per cent or one-half of one per cent of these logs, and even the Examiner pointed out when he stopped the cross-examination of Mr. Perrin on this testimony, that it had been made to clearly appear that Mr. Perrin's testimony in this respect "was based upon assumptions and hopes" (R. 898). We shall point out what the record shows about this pine business, and there is no contradiction or ambiguity about the record on this subject.

As has been pointed out, the carrier failed and refused to produce any figures showing the amount of revenue which had been derived from the traffic in question under the Cummer Scale. The record shows that the carrier proved, and the Commission's former report shows, that under the Cummer Scale there was a "substantial movement in less than trainloads". What the revenue was from that "substantial movement" or from any movements in trainloads of anyone other than the shippers who here testified only the carrier knows and the carrier refuses to disclose it. We can, however ascertain from the record the amount of revenue which was derived from the trainload movements of the shippers who here testified under the Cummer Scale during the years preceding the entry of the former order of the Commission. And Exhibit 61 of the carrier has furnished data and information from which has been ascertained

the revenues which were derived from the intrastate transportation of pine logs during each of the first two years of the effectiveness of the intrastate rate prescribed by the Commission (R. 861-862, and Exhibits 121 and 122, R. 1173-1174).

We shall first ascertain and set forth the amount that was derived from these *trainload movements* of pine logs only during the years immediately preceding the date of the former order of the Commission prescribing the intrastate rate.

The record in the former proceeding (Former Record, 600 and 360-361) and the testimony in the reopened proceedings (R. 747, 766) show that the revenues of the carrier from trainload movements of pine logs to Putnam Lumber Company and Brooks-Scanlon Corporation alone were as follows:

1923	$410,007.29
1924	471,739.16
1925	482,400.13
1926	467,391.47*
1927	402,157.86*
1928	353,136.00

*The total payments of Putnam Lumber Company for trainload movements of pine and cypress are set out in the record but the payments on pine are not segregated from the payments on cypress for the years 1926 and 1927. The record does show (Former Record, 600 and 360-361, and R. 746) that the ratio of pine to cypress was about the same in 1926 and 1927 as in the three preceding years. That ratio is therefore used in segregating the payments. All other figures are exact.

We can observe in the above figures the blighting influence of this proceeding, for the revenues began to diminish in 1926 when this proceeding began. But let us see the figures for 1929 and 1930 after the order had become effective. Bear in mind that in those two years, and for those two years alone there can be spelled out of the record the total amount of revenue derived by the carrier from the log traffic in Florida under any scale of rates and then only under the increased rate prescribed by the Commission.

Figures for these years are in Exhibits 121 and 122 (R. 1173-1174). They show that from February 8, 1929, to January 31, 1930, the entire revenue which was derived by the carrier from the Florida intrastate pine log traffic, in carloads and in trainloads, was the sum of $31,052.33 (See also the report of the Commission at page 171).

And for the period commencing February 1, 1930, and ending January 31, 1931, the entire revenue derived by the carrier from the intrastate pine log traffic, in carloads and in trainloads, was the trifling sum of $5,228.84 (R. 1171 and report of Commission at page 171).

So it is to be observed that the amount of the entire revenue derived by the carrier from the Florida intrastate traffic in pine—the major factor in the Florida lumber industry—during the second year of the high rate (1930) was less than one and two-tenths (1.2%) per cent of the revenue derived from such intrastate traffic in trainload quantities to two shippers alone dur-

ing the year in which this proceeding was initiated.

The report of the Commission at page 174 quotes the testimony of the carrier's witness to the effect that nine billion feet of pine logs may be assumed to be reasonably adjacent to the carrier's tracks in Florida and might be hauled over it. If that railroad were to now undertake to haul nine billion feet of pine logs and hauled them at the rate it was hauling pine logs in Florida in the second year of the unlawful high rate, it would take a trifle over six thousand years to perform the undertaking.

Excluding the Hines to Palatka trainload movement of the Wilson Cypress Company, which we have shown would not move again at the high rate and could only last for a short while anyhow, the revenue produced at the high rate on cypress logs in the first year of the high rate was $76,866.90 and in the second year $36,387.01, and on hardwood logs in the first year of the high rate was $96,971.97 and in the second year $28,658.90 (186 I. C. C. p. 171). So the traffic in these logs (of lesser importance in the lumber industry) was following the decline in the traffic in pine logs.

(4) *The Effect of the Depression on the Log Traffic.*

The Interstate Commerce Commission is unwilling to assume full responsibility for the havoc that was wrought by its former order. At page 171 the report observes:

> "The generally depressed conditions throughout the country, in Florida, in the lumber industry generally, and in the Florida log industry have also had a marked influence upon the volume of the log movement in Florida".

At various other places in the report similar attempts are made to shift the blame for what has happened to the depression. This is directly contradicted by the record. We shall show what the witnesses said on the subject. Mr. Cummer testified that in 1929 the Cummer Cypress Company shipped its entire output and that it enjoyed a very satisfactory business during the first six months of 1930 (R. 739). Mr. Fleishel testified that the Putnam Lumber Company made more money in 1929 than it ever did in any year and that it was a pretty good year in the lumber industry generally in Florida and the southeast, and that the depression did not strike the lumber business until in the spring of 1930 (R. 753-754). Mr. Foley testified that 1929 was "a very satisfactory year in the lumber business", but that the Brooks-Scanlon Corporation lost that whole year in making the transfer of the location of its mill caused by the increased rates (R. 777). The Wilson Cypress Company had a "pretty good market" in the years, 1928, 1929 and 1930 and, Mr. MacPherson said he would say generally that business was "pretty good" (R. 793-794).

Not one lumberman contradicted this testimony and these were the large lumber operators speaking—men whose business it was to be familiar with the very subject they were talking about. The only witness who even

intimated the contrary was the witness Perrin, who having testified as a rate expert for the Atlantic Coast Line now assumed the role of lumber expert and announced (R. 880):

> "Statistics show that if there was any unusual degree of prosperity in the lumber industry in Florida in 1929 that condition must have been peculiar to Florida as distinguished from the lumber industry of the country as a whole."

He then produced his statistics (R. 1179, Exhibit 127) whereof he spoke. Those statistics show, among other things, the number of tons of lumber, shingles, laths, box, crate and cooperage material handled by the Atlantic Coast Line Railroad on its entire system in each year from 1920 to 1930 inclusive. And it shows (R. 1179) that in *1927* that railroad handled *3,045,574* tons of such materials, and in *1928*, *3,093,168* tons, and in *1929*, *3,109,401* tons, and in 1930, 2,211,258 tons. The railroad handled more lumber (but not logs) in 1929 than it did in 1928, and more in 1928 than it did in 1927. Mr. Perrin's statistics contradicted his testimony on the subject. Undoubtedly there was a falling off *in* the year 1930, but the year 1929 was one in which the sale of lumber was good.

We have referred to *all* the evidence in the record concerning the depression in the lumber business in Florida. Yet the Commission says that depressed conditions "had a marked influence upon the volume of the log movement in Florida."

(5) *Summary of the Evidence With Respect to the Revenue That May Be Reasonably Expected.*

The evidence shows that under the Cummer Scale of rates large and profitable businesses were established and prosperous communities grew up. The Commission reaches the conclusion at page 176 of the report that there will be a large intrastate movement of logs over the carrier's lines in the future. The history of the Florida lumber industry and past experience demonstrate the soundness of that conclusion *when the Cummer Scale or its equivalent is applicable.* The record of the two years application of the high rate prescribed by the former order of the Commission demonstrates that that high rate will not only "discourage patronage", but will effectually destroy the traffic, even when the lumber market is good, and that the only finding which could be made as to the revenue "which could reasonably be expected under the increased rates" is that that revenue would be trifling and inconsequential.

POINT V.

There Was No Sufficient Finding and No Evidence Upon Which the Commission Could Base a Sufficient Finding That the Alteration of the Intrastate Rate Would Produce or Would Be Likely to Produce Additional Income Necessary to Prevent an Undue Burden and to Maintain an Adequate (National) Transportation System.

(Applicable to Assignments of Error Nos. 1, 2, 3, 5 to 11 inclusive, 17 to 31 inclusive.)

(a) *The Low "Earnings" of the Railroad as a Whole or the Low "Earnings" from Log Traffic as Compared to Other Traffic Can Not Justify the Invasion of State Domain.*

As a preliminary to its estimate of what the revenue results would be from the prescribed intrastate scale "under normal economic conditions", the Commission declares in its conclusions and findings in its report of July 5, 1932 (188 I. C. C. text 187):

> "The record shows the low earnings of the defendant; the low earnings on its log traffic as compared with its earnings on other low grade commodities; the much lower earnings

> on its Florida log traffic than on its interstate log traffic; and the much lower level of the Cummer Scale than of other scales applicable interstate and intrastate throughout the South. These facts and the cost evidence clearly warrant the conclusions that the traffic moving under the Cummer Scale does not pay its 'fair proportionate share' of operation and maintenance alone".

Brief comment upon this statement of the Commission may well here be made. These "facts" and "cost evidence" do not warrant any such conclusion, even if they were pertinent to that question. The low aggregate earnings of the defendant carrier in and of themselves are insufficient to warrant the raising of the level of a particular rate.

Dayton-Goose Creek Railroad Company vs. United States (supra).

The comparison of the "earnings" on the log traffic of the carrier with the "earnings" on the other low grade commodities and the comparison of its "earnings" on its Florida log traffic with the "earnings" on its interstate log traffic does not pretend in any instance to be net earnings. They are wholly the result of computations by which rates are multiplied by tonnage and bear no relation to cost of service. As this Court pointed out in the *Florida Log case*, supra, text 213, 214, such estimates will not justify the

invasion of state domain by the Federal power.

When the report and order of the Interstate Commerce Commission of July 5th, 1932 was published, the level of the interstate and intrastate log rates throughout the South had so changed and was so changing (and with the permissive sanction at least of the Interstate Commerce Commission) that before the order became effective the general level in practical operation and effect was substantially that of, or lower than, the Cummer Scale. It was solely upon those "facts" and the "cost estimates" that the Commission reached the conclusion that "the traffic moving under the Cummer Scale does not pay its fair proportionate share of operation and maintenance alone".

The so-called cost evidence to which the Commission makes reference is no more nor less than a series of computations based upon averages of the cost of handling all freight. The costs so shown are not the cost of transporting logs. This subject will be hereinafter fully considered under Point VII. of this brief, and we shall there show that this method of determining cost, if in fact cost of service is material to the inquiry here, has been condemned both by this Court with respect to this particular commodity and by the Interstate Commerce Commission as well.

(b) *The Estimate as to Future Revenue Under the Increased Rates Which the Commission Made.*

However, all of this is beside the point. For the Com-

mission nowhere has found what, if any, amount of additional income would be produced by the present alteration of the intrastate rate under existing economic conditions.

It says, at page 189:

> "Accordingly, on the basis of an average of 7,431 cars a year under normal economic conditions, which basis we believe conservative, the gross revenues under the rates prescribed by the previous order herein would be more than $100,000 a year greater than under the Cummer Scale, now in effect."

Not only is that estimate confined solely to the movement which will occur and the revenue which will be derived per annum under "normal economic conditions", but it was also frankly founded upon the express belief that the log movement in Florida would not be materially curtailed under the prescribed rate and that the rates prescribed are "the same or substantially the same as the rates generally in effect and under which logs move freely throughout the South".

We point out here how obviously contrary to the record the first of those assumptions was and how the second has been shown by subsequent proceedings even more at variance with the facts than the first, due to then existent and subsequent alterations of the level of interstate and intrastate log rates elsewhere in the South,

including those on four railroads in interstate commerce in Florida.

(c) *The Record Shows That the Movement of Logs Over the Carrier Will Be Materially Curtailed by the New Order of the Commission.*

Not only do the Newly Reduced Rates established all over the South show that logs will not move under the high rate, but the testimony here directly established the fact that the remnant of the log business of the carrier in Florida was going to shrink materially if the rate here prescribed by the Commission were put into effect in this proceeding. It would appear that experience should have sufficiently demonstrated that, from the destruction which resulted from the first order, but in addition to that the testimony as to the future was direct and positive.

We have pointed out that the president of Wilson-Cypress Company (which company shipped almost half of the logs that moved on the lines of the carrier in Florida in the two year period of the high rate) testified, and his testimony was in nowise contradicted, that the company would not ship any logs under any rate substantially higher than the Cummer Scale (R. 783). So if the Interstate Commerce Commission is to estimate the revenue which will be received under the two scales of rates, it can cut off half of its estimate under the high rate right there.

F. S. Buffum Company, Incorporated, is a new party to this proceeding. It alleges in its bill of complaint (R. 527) attacking the order that it began operations in Jack-

sonville in 1930 (R. 531), that under the high rate then in effect it could not ship logs to its mill by railroad but relied almost entirely upon receiving logs by truck and by water (R. 531-532) which only enabled it to operate intermittently (R. 532), that after the restoration of the Cummer Scale in 1931 it substantially increased its rail shipments of logs so that, whereas in 1930 under the high rate it averaged about 12 cars of logs a month by rail, in 1932 under the Cummer Scale it was receiving an average of 76 carloads of logs per month, an increase of about 633 per cent (R. 532). It averred that its investment and business were placed in jeopardy by the Commission's order (R. 533) and that it had been giving employment to about 125 persons at its mill and approximately 100 more persons who were engaged in cutting its logs (R. 531). All of this was substantiated by the testimony of the president of the company (R. 956-962). He testified (R. 959):

> "The restoration of the Cummer Scale enabled us to bring in a large additional supply of logs over the Atlantic Coast Line, and it was only after the restoration of that scale that we were able to draw from longer distant points, thus supplementing our truck and water supply, and thereby receive sufficient total supply to enable us to operate our plant continuously. Unless the Cummer Scale or its equivalent is continued in effect we cannot bring in any logs by rail, other than an occasional car from nearby points."

Again (R. 962) he testified:

> "The cancellation of the Cummer scale would undoubtedly cause an almost immediate and almost total elimination of railroad movement of logs into our mill."

This testimony likewise was not contradicted, but apparently had no effect upon the Commission's report.

The Wilson Lumber Company of Florida, located at Perry, was in the former litigation in this Court and is an appellant here. The secretary of that company testified (R. 981):

> "Wilson Lumber Company of Florida first began to ship logs over the Atlantic Coast Line Railroad in Florida in 1928, just a few months before the Cummer scale was superseded by the scale prescribed by the Interstate Commerce Commission. When the mill of the Wilson Lumber Company of Florida was built I did not have any information about the proposal to change the rates. Had we had any information that the rates on logs would be more than doubled we would not have built the mill."

He showed that that Company could obtain logs by trucks and "in view of the uncertainty of whether the Cummer scale will continue in effect" was obtaining bids for trucking its logs (R. 982). Illustrating this he showed one bid for moving the logs from one tract of land to the

mill by truck which was at substantially the same cost as moving them under the Cummer Scale. The revenue on those logs under the Cummer Scale would be around $30,000, and the Company would move them over the railroad "if the Cummer Scale remains in effect" (R, 982).

There was no testimony that any shipper would ship any logs at the high rate, and it is apparent from the record that with the high rate in effect the shippers will have to rely upon securing their logs by truck and by water or be forced out of business with further losses of investment and further unemployment resulting from the action of the Commission in this proceeding and with further reductions in the revenues received by the carrier.

(d) *The Estimate as to Future Revenue Under the Increased Rate Is Wholly Insufficient to Justify the Invasion of State Domain.*

All that the Commission has done is compute the difference in "earnings" under the two scales of rates upon 7,431 cars per year with the "belief" that the log movement would not be "materially curtailed" under the prescribed rate—all related to "normal economic conditions." The Commission's report recognized that the then existing economic conditions were not normal and it did not attempt to prophesy when normal economic conditions would return.

Even if this finding were applicable to existing economic conditions as distinguished from normal economic conditions, it would fall far short of the requirements of the Wisconsin Fares Case supra, the New York Case, supra,

and the Florida Log Case, supra, with respect to the substantial disparity and substantial burden which must be made to *Nearly appear* before the Interstate Commerce Commission is authorized to invade State domain.

POINT VI.

Even If It Were Possible to Find Any Unjust Discrimination Against Interstate Commerce in This Proceeding, There is No Finding and No Evidence Upon Which the Commission Could Base a Finding That That Discrimination was of Such Character and Consequence That It Was the Affirmative Duty of the Commission, as an Important Step in Maintaining an Adequate National Railway Transportation System, to Remove It.

(Applicable to Assignments of Error Nos. 17 to 26 inclusive, 30, 43, 44).

We now examine the character of burden which the Commission says exists. At pages 188-189 the report of July 5, 1932, discusses the number of cars of logs that moved in Florida during the two years of the high rate and the revenue derived therefrom. It discards the cars that moved in the trainloads to Brooks-Scanlon Corporation and to Cummer Cypress Company for it recognizes that those movements are ended. It determines the remaining cars to be 14,862 and computes the revenue derived on those cars under the high scale formerly prescribed by it during these two years, and the revenue which

would have been derived on the same cars under the Cummer Scale, and it concludes:

> "Accordingly, on the basis of an average of 7,431 cars a year under normal economic conditions, which basis we believe conservative, the gross revenues under the rates prescribed by the previous order herein would be more than $100,000 a year greater than under the Cummer Scale, now in effect. The application of the Cummer Scale, therefore, places a substantial burden upon defendant's interstate revenues. If the revenues yielded by the Cummer Scale are not sufficient to cover the cost of the service, as the cost evidence indicates, it would follow that part of the above stated amount would constitute a dead loss in net revenue."

The record shows some 18,602 cars of logs moved intrastate during the two years following the increase in rates under the unlawful order of the Interstate Commerce Commission, 186 I. C. C., text 188. As has been pointed out, the Commission found that 3,740 of these cars moved in trainload movements that had ceased and would not be resumed (Text 188). Approximately 8,000 of this number which the Interstate Commerce Commission divides between two years of "normal economic conditions" moved in trainloads from Hines to Palatka for Wilson Cypress Company. There will be no more trainload movements to Palatka under the high rate, according to the uncontradicted testimony of the president of that company. This

alone would more than reduce the Commission's figures by half.

But accepting, for the purpose of argument, the Commission's figures, the critical *national* situation requiring invasion of State domain and prerogatives by Federal power and all this record and effort is said to be an annual sum which "under normal economic conditions" would amount to some indeterminate part of $100,000. The Commission did not even estimate what that "part" would amount to under "normal economic conditions." What it would amount to in the abnormal year 1933, or the many abnormal years which may confront us, is wholly unmentioned in the report.

Just some part of $100,000 is the alleged burden said to exist. If it were an actual burden of all of $100,000 a year, it would require 32 years for the removal of that burden to counterbalance the burden which was laid upon the Brooks-Scanlon Corporation alone by the former order of the Commission. And the burden which is now laid upon investments and employment in Florida by this new order of the Commission is not considered.

It appeared in the *Wisconsin* case (Wisconsin Railroad Commission v. C. B. & Q. R. Co., supra) that the loss in actual revenue, by reason of the refusal to permit the increase in State rates, would be approximately $6,000,000 per annum. In the *New York* case (New York v. United States, supra) the amount was approximately $12,000,000 per annum. In the *Louisiana* case (United States v. Louisiana, supra) the order involved a plan outlined to produce between $100,000,000 and $125,000,000 in increased revenue to the carriers annually.

It cannot be said that the removal of the burden here, even assuming that any burden may exist, amounting to an indeterminate part of $100,000 per year "under normal economic conditions" is an "important" step in maintaining an adequate "national railway system" or that any such burden could constitute an "obstruction" to interstate commerce which is so "real and substantial" as to authorize the exercise of Federal power to supersede State power. Particularly is this true when it here appears that there is no longer any substantial disparity between the level of interstate rates and intrastate rates applicable generally upon logs in the Southern rate group, and the Cummer Scale of rates which is under attack.

POINT VII.

The Cost and Revenue Studies Founded Upon System Averages are Insufficient to Supply the Essential Facts as to the Particular Traffic and Revenue and the Effect of the Intrastate Rates Existing and Future Upon the Income of the Carrier.

(This is applicable to Assignments of Error Nos. 1, 2, 3, 5 to 11 inclusive, and 14 to 31 inclusive.)

The only basis, other than the rate comparisons, upon which the order of the Interstate Commerce Commission claims support is the cost evidence which is reviewed in that report. The report begins the consideration of the

cost evidence with the statement (186 I. C. C. at 176-177):

> "It is manifest that if the Cummer Scale produces less revenue than the cost of the service, declines in the traffic have the favorable effect of reducing defendant's losses and that an increase in the traffic would only serve to augment those losses."

It winds up with the conclusion at p. 187 of the report:

> "It is of course well known, as defendant concedes, that it is impossible on a system like the defendant's, engaged in the general transportation of all kinds of freight and of passengers, to determine accurately the exact cost of transporting any one commodity. From the evidence submitted in this case, however, we are convinced that the defendant's revenue under the Cummer scale of $15.12 per car for transporting a car of logs weighing 56,754 pounds a distance of 81 miles, and transporting the empty car back, is insufficient under all the circumstances and conditions to cover the full cost of the service."

(a) *The Cost Studies of the Carrier Were Insufficient and Were Condemned as Such by the Commission.*

We propose to examine the evidence upon which that conclusion purports to be based. The railroad, through its witness Mr. Lamb, put in evidence these costs studies which are discussed from pages 177 to 183 of the report.

Those cost studies proceed upon the following theory: The total expenses, or cost, of all freight handled on the Atlantic Coast Line Railroad for the year 1929 was $36,308,812.74 (R. 1138). This amount was, of course, spread over a great many accounts in accordance with the rules and regulations of the Interstate Commerce Commission for the classification of accounts. Mr. Lamb then eliminated what he says are all or substantially all of the yard and terminal expenses, which involve the handling of less-than-carload freight and other matters which Mr. Lamb says may have no relation to handling logs. This elimination leaves him with $26,701,014.07, which he terms "haulage expense." This term "haulage expense" is a misnomer, for if he had eliminated all terminal expense he would have eliminated a greater amount. This is demonstrated by the fact that the Interstate Commerce Commission, when it eliminated terminal expense, was left with only $24,463,384 for haulage expenses (186 I. C. C. 196).

Mr. Lamb then observes that among those total expenses there are certain specific expenses which he terms "out-of-pocket" expenses. They are the direct costs of freight service, that is, trainmen's wages, cost of fuel,

water, lubricants and other supplies for locomotives and trains and repairs. Those "out-of-pocket" expenses on all freight during that year amounted to $6,920,683.75. This amount is 19.0606 per cent, or approximately one-fifth, of $38,308,812.74 (the total expenses) and 25.9192 per cent, or approximately one-fourth, of $26,701,014.07 (the so-called "haulage expenses"). His theory then is that the out-of-pocket expense of any freight service is approximately one-fifth of the total expense of that service and approximately one-fourth of the haulage expense of that service.

Having ascertained the out-of-pocket expense of any particular freight service, he will multiply it by five to ascertain the total expense and by four to ascertain the haulage expense. He will then add certain percentages to the resulting figures for taxes and a profit on the business and the final figures so achieved are said by him to represent the amount his railroad should receive. One final figure, he says, will include only haulage costs and the other will include all costs. He then says that the proper figure for the cost of transporting logs will lie somewhere in between the two final figures so achieved, because some of the terminal costs are not attributable to the transportation of logs and others are.

This is illogical, because it is not reasonable to assume that the relation between out-of-pocket, or direct costs, and other costs is a fixed ratio in the handling of all freight. It is merely the use of a system average. But the more important fallacy in the theory occurs when Mr. Lamb undertakes to ascertain the out-of-pocket expenses of the log traffc in Florida—the basic data from

which his other calculations are derived. He did not undertake to find out what the actual out-of-pocket expense of the log traffic in Florida was. Instead he undertook to determine what was the average out-of-pocket expense of handling *all* freight in Florida during the year and to use that average cost as the out-of-pocket cost of handling logs.

He therefore determined that the entire out-of-pocket expense incurred during the year by the railroad in Florida (or rather the third division of the railroad which comprises substantially all of its lines in Florida) in transporting all freight amounted to $2,059,610.66 (186 I. C. C. 177). The gross ton-miles of all freight in Florida during the year were 2,332,812,000 (186 I. C. C. 178). Dividing these ton-miles by this out-of-pocket expense produced an average out-of-pocket expense of .0882888 cent per gross ton-mile. He assumed this to be the out-of-pocket expense per gross ton-mile of the log traffic in Florida, although it was the average out-of-pocket expense per gross ton-mile of all traffic in Florida, and accordingly used it as his basic data for figuring costs of the log traffic.

He would multiply this assumed out-of-pocket expense per gross ton-mile by the number of gross ton-miles in any particular log movement and then multiply the result by four and by five and then add on a percentage for taxes and profit and declare the two resulting figures to represent the cost of that log movement, one figure being said to overstate the cost and the other to understate it.

It will be observed at once that these figures are just as applicable to the perishable and expensive fruit and vegetable traffic in Florida as they are to logs. The cost

so produced is only an average cost of the handling of all freight in Florida, carload and less-than-carload, fruits, and vegetables, manufactured products, and all other commodities, as well as logs. It is well known that the handling of these other commodities is much more expensive than the handling of logs and that these other commodities will and do bear higher freight charges than logs.

The great expense attendant upon the transportation by the carrier of fruits and vegetables in Florida had been fully testified to by representatives of that carrier in other proceedings before the Interstate Commerce Commission and that testimony was produced in this proceeding by the appellants (R. 1185-1205).

An average of the cost of handling all freight in Florida fails, in addition, to give consideration to the fact that this average contains an unusual proportion of terminal expense due to the fact that approximately 45% of the total tons of freight handled on the Atlantic Coast Line Railroad system either originated or terminated in Florida or moved entirely within that State (186 I. C. C. 166). This means that the total out-of-pocket costs in Florida contain an excessive percentage of pick-up and delivery charges, assembly and switching services in connection with the interstate operations in which the large costs of getting the traffic started or delivered are incurred in Florida whereas nearly all of the ton-miles are made over the balance of the system in the transportation to or from Florida.

To add together all these costs of handling all freight in Florida and then strike an average and then declare that average to be the average cost of handling logs is

absurd. First, it is obviously erroneous, and second, it is the use of a "system average" in determining the cost of handling a particular commodity, a method condemned by this Court and by the Interstate Commerce Commission.

The Commission itself was forced to recognize this, and it concludes its review of the railroad's cost evidence by dismissing it in the following language (p. 182-183 of the report):

> "The unit cost figure of 0.0882888 cents per gross ton mile was admitted by defendant to represent merely the average out-of-pocket expense of handling all traffic on the third division. It cannot, therefore, be accepted as indicating the average out-of-pocket cost to defendant of transporting logs in Florida. *Nor. Pac. Ry. v. Dept. Public Works, 268 U. S. 39; Calif. Growers' & Shippers' Protective League v. S. P. Co., 129 I. C. C. 25, 52.* It appears that nearly 25 per cent. of the traffic moving in Florida consists of fruit and vegetables which require special and costly service. The cost of such service enters into the average out-of-pocket cost of the third division and would apparently tend to make it higher than the actual out-of-pocket cost of the log traffic. The conclusion seems to follow that the average cost figure of 0.0882888 cents per gross ton mile is higher than the actual out-of-pocket cost of the Florida log traffic."

The arbitrary manner in which the Commission has approached this problem is probably no better examplified than in its insistence upon setting forth in minute detail in its report a series of transportation costs which it acknowledges to be wholly insufficient, and after so doing condemn such cost figures as system averages which "cannot, therefore, be accepted as indicating the average out-of-pocket cost to defendant of transporting logs in Florida."

(b) *The Determination of Costs by System Averages is Improper, Particularly in the Case of Low Grade Commodities.*

It is to be observed that by a rare coincidence the decision of this Court which condemns system averages as indicative of the cost of specific transportation hauls of a particular commodity was a case involving rates on logs. *Northern P. R. Co. v. Department of Public Works, 268 U. S. 39.* In that proceeding the State of Washington attempted to fix rates for the transportation of logs intrasate, on the basis of costs as indicated solely by system averages. This was condemned by this Court in emphatic language, as follows:

> "The department's findings concerning operating costs rested largely upon deductions from data found in published reports of the carriers and in their exhibits filed in this case. Instead of attempting to show by evidence, reasonably specific and direct, what the actual operating cost of

this traffic was to the several carriers, the Department created a composite figure representing the weighted average operating cost per 1,000 gross ton miles of all revenue freight carried on the four systems, and made that figure a basis for estimating the operating cost of the log traffic in Washington. *This was clearly erroneous.*

"A precise issue was the cost on each railroad of transporting logs in carload lots in western Washington, the average haul on each system being not more than 32 miles. In using the above composite figure in the determination of this issue the Department necessarily ignored, in the first place, the differences in the average unit cost on the several systems; and then the differences on each in the cost incident to the different classes of traffic and articles of merchandise, and to the widely varying conditions under which the transportation is conducted. In this unit cost figure no account is taken of the differences in unit cost dependent, among other things, upon differences in the length of haul; in the character of the commodity; in the configuration of the country; in the density of the traffic; in the daily loaded car movement; in the extent of the empty car movement; in the nature of the equipment employed; in the extent to which the equipment is used; in the expenditure required for its maintenance. Main line and branch line freight, interstate and intrastate, carload and less than carload, are counted alike. *The Department's error*

was fundamental in its nature. The use of this factor in computing the operating costs of the log traffic vitiated the whole process of reasoning by which the Department reached its conclusion." (Italics supplied.)

And what the State of Washington itself could not do in the regulation of intrastate rates on logs in that State, the Commission most assuredly cannot do in regulating intrastate rates on logs in the State of Florida.

The Interstate Commerce Commission has consistently held to the same opinion as was expressed in this last cited case by this Court. See *Calif. Growers & Shippers' Protective League v. S. P. Co., 129 I. C. 25;* cited in the above quotation from the report in this case. Thus, in *Western Trunk Line Class Rates, 164 I. C. C. 1, 188* the Commission expressed an unwillingness, "to assume that average unit line-haul cost on all traffic represent line-haul costs on class traffic." The reason why "system averages" will not do is readily apparent.

(c) *The "System Average" Costs Computed by the Commission After Condemning this Method of Ascertaining Costs.*

Now having discarded the cost studies submitted by the railroad, the Commission, finding itself devoid of cost studies in the record, proceeds to a most remarkable feat of reasoning. On page 183 of the report the Commission begins with this statement:

"There appears to be no doubt that the operating costs per unit are generally higher in Florida than the average for the defendant's system as a whole either including or excluding Florida."

The principal reasons why average costs of all freight may be higher in Florida than elsewhere on the system are that it is a "terminal" state, that is, freight traffic either ends or begins there, and there is no through interstate traffic. All interstate freight traffic in Florida therefore receives a terminal service, that is, it is loaded or unloaded and delivered. This is of course one of the major expenses in freight handling, and vastly increases costs attributable to that State when unit costs are determined by dividing the costs incurred by the ton-miles of traffic made in the State. But it does not follow that intrastate freight is any more costly to handle there than it is in Georgia or North Carolina.

A second principal reason why the average cost of all freight in Florida may be higher than elsewhere on the system is the very large traffic, actual and relative, in perishable fruits and vegetables, which requires high standards of transportation service and attention at a very heavy cost, but which cost is not in any way to be attributed to the transportation of logs. We have shown that those characteristics of the Florida traffic, and particularly of the perishable fruit and vegetable traffic, were elaborately set forth in the record (R. 1185-1205).

However, disregarding these facts, we shall follow the reasoning of the Commission. Having arrived at the con-

clusion that the average cost of handling all freight is greater in Florida than it is elsewhere on the system, the Commission therefore deduces (p. 184 of the report):

> "In view of this fact, system figures including Florida, which are not in question, may be utilized as the basis for approximately the cost of transporting logs in that State."

Thus the conclusion is not that the average cost of transporting *logs* on the system may be used to determine the cost of transporting *logs* in Florida, but that the average cost of transporting *all freight* of every kind, character and description, including perishable fruits and vegetables, silks, satins and all other high grade commodities, on the whole system may be used to determine the cost of transporting *logs* in Florida. This is just as logical as to say: The average mountain is larger than the average mole-hill, therefore to determine the size of a small mountain we will measure the average mole-mill.

The Commission then sets out to measure the average cost of handling all freight on the system in the year 1929 and declares that it is thereby determining the average cost of handling logs in Florida. This occupies the balance of the report down to the conclusion and the detailed calculations are set forth in Appendix E of the report.

Appendix E, as will be observed by the Court, is a highly involved statistical compilation, necessitating the use of a mass of figures and a multitude of computations not displayed in the exhibit itself. The data relied upon to produce the result are not supported by record reference

save in one instance; where else in the record these various data appear is a matter upon which the Commission has failed to enlighten either the parties or the Court.

The Court will observe that the title of the Exhibit E cost study of itself shows that the study produces merely an "estimated cost of transporting logs in Florida", and it is "based on A. C. L. average costs per unit". In other words, the title of the Commission's exhibit recognizes that the result is a mere estimate and that it is based entirely on system average costs.

It is interesting to observe the method by which the Commission proceeded to construct this cost evidence. It began with the total freight operating expenses of the railroad in 1929 of $36,308,813 (186 I. C. C. 196). It eliminated, as expenses not involved in handling logs, the sum of $1,281,069. These items so eliminated were: maintenance of wharves and docks, floating equipment, outside agencies, advertising, traffic associations, industrial and immigration bureaus, and the cost of superintendence and general expenses in connection with those eliminated items. All other expenses in connection with the handling of all freight were assumed to be just as applicable to logs as to any and all other freight. Before proceeding further we point out that if these eliminated items had been left in they would have increased the cost which the Commission has computed for the average car of logs by $1.02. So if it be said that the Commission made any adjustment from the purely average cost for the simpler nature of the log traffic, that adjustment was $1.02 per car on the average car of 56,754

pounds traveling a distance of 81.36 miles (which was the average during the two year period of the high rate).

Having made this trifling and inconsequential deduction, the Commission apportions all of the remaining $35,027,744 between haulage and non-haulage, or terminal, expenses. The haulage expenses ($24,643,384) so apportioned are divided by the gross ton-miles of all freight handled on the system in the year (11,600,829,000), and an average haulage expense per gross ton-mile ($.0021243) thus determined (186 I. C. C. 196-197). The gross ton-miles in the movement of the average car of logs, that is, the tons of the weight of the car plus the load of 56,754 pounds multiplied by the loaded movement of 81.36 miles and in addition the tons of the weight of the car multiplied by the 81.36 miles of the empty return movement, is then computed and found to be 4994 gross ton-miles. The average haulage expense per gross ton-mile ($.0021243) of all freight is then multiplied by the gross ton-miles in the movement of the average car of logs (4994 gross ton-miles) and the result ($10.61) is termed the "haulage expenses" (186 I. C. C. 197) of the average car of logs.

The Commission then adds "non-haulage" expenses. To determine those expenses it goes back to the apportionment which it made of all freight expenses between haulage and non-haulage expenses, and ascertaining that it there apportioned $10,384,360 to non-haulage expenses, it deducts approximately one-fourth of that amount for excess terminal expenses incurred for less-than-carload over that incurred for carload freight upon some "estimate" that that is about the right deduction for the difference in non-haulage expenses between carload and less-than-carload freight. The

remaining non-haulage expense ($7,828,582) is divided equally among the total loaded cars of all freight carried during the year (1,211,775) with the result that it is determined that the average non-haulage expense per car is found to be $6.46 (186 I. C. C. 196-197).

The haulage expenses of $10.61 is then added to the non-haulage expense of $6.46, making a total of $17.07 per car which is denominated "operating expenses". A percentage (approximately 45%) of these "operating expenses" is then added for taxes and profit (although no profit at the rate here added was being earned by the traffic as a whole at the time) and the final result so achieved is a cost of $24.69 (186 I. C. C. 197). Observing that the Cummer scale on this average car of logs would have produced only $15.12 in revenue the Commission concludes that it is too low. The rate which it prescribed would produce a revenue of $31.21 on this average car of logs.

Having condemned the use of system averages in this very report, the Commission contrary to the decision of this Court and its own decisions proceeds to determine a purely system average cost of handling all freight traffic and label that determination "Estimated Cost of Transporting Logs in Florida" when the cost so determined has no more relation to the handling of a car of logs than it has to the handling of a car of early strawberries and no more relation to handling any freight in Florida than it has to the handling of any freight in Virginia or Alabama. The cost so determined is nothing more or less than the average cost of transporting a car of a given weight containing the average freight a given distance. And the sole reason for

assuming that the Cummer Scale does not produce a reasonable return on logs in Florida is that it produces less than the *average* cost of transporting in 1929 a car containing a given weight of the *average freight* a given distance, anywhere on the system of the Atlantic Coast Line.

Freight rates are made up of schedules constituting a multitude of different levels: high-grade and valuable property, perishables and the like bear very high rates and produce greatly more than the average cost of transporting the average car. The cost and expense properly chargeable to high-grade freight is of course both actually and theoretically greatly in excess of that charged to low-grade commodities, which latter move largely in considerable quantities in regular movements. The very fact that, as found by the Commission (186 I. C. C. 166), in 1928 "the system log tonnage constituted 7 per cent. of the total system tonnage, whereas the revenue from the log tonnage was only 1.9 per cent of the total revenue", demonstrates that logs do not and will not bear the average charge per ton made for the transporting of all commodities. The very term "average cost" implies that there must be many below as well as many above the average. So it is readily understandable why both this Court and the Interstate Commerce Commission have repeatedly condemned any such method of ascertaining the cost of transporting a single commodity.

(d) *The Cost Evidence With Respect to the Log Movement of the Wilson Cypress Company from Hines to Palatka.*

The only other cost evidence was that relating to the trainload movement of the Wilson Cypress Company from Hines to Palatka. At our request the railroad produced the out-of-pocket expenses in connection with the movement for the month of November, 1930 (R. 909-910, 1184). That shows that these expenses of that movement for that month amounted to $2,398.55 (R. 1184 and 186 I. C. C. 181). There were 490 cars of logs in the trains and 8 cars of other freight and 553 cars returning empty. Disregarding the fact that more empty cars were handled than loaded ones, so that the month could not have been average in that respect, we point out that the average direct expense per loaded car was $4.81. This $4.81 per car was the amount the railroad would not have spent if it had not run these log trains. Of course, there were indirect, or overhead costs, which went on whether the logs moved or not and toward the payment of which the movement of the logs should have made some contribution. The Commission found that the revenue received under the high rate in effect at the time was $41.60 per car and under the Cummer scale it would have been $20.48 (186 I. C. C. 182). Using Mr. Lamb's theory the Commission multiplied the out-of-pocket expense per car and obtained a haulage cost of $18.51 per car, to which it added taxes of $2.91 and profit or return on investment of $6.10 obtaining a total cost of $27.52 per car (186 I. C. C. 182).

But for any such purpose as obtaining total costs these out-of-pocket expenses of this movement are erroneous. Mr. Lamb's attention was directed (R. 911) to the fact that the charge for locomotive fuel coal seemed excessive. He could not explain this at the time but promised to do so later. His letter of explanation, dated after the proceeding was closed (R. 1206), showed that in computing the cost of this coal he had included five mills per ton per mile for transportation of such coal on the rails of the Atlantic Coast Line up to the Florida State line. The result of this was to increase the out-of-pocket charge for coal about one-third. Of course, it was not an out-of-pocket expense as it was never paid to anyone.

The record shows that the Commission's own Classification of Operating Expenses Accounts forbids any such charge (R. 132, 182, 243). And the Commission's report says (page 184):

> "Coal is charged to the operations in Florida at the average system cost, notwithstanding a substantial haul from the Alabama, Virginia or West Virginia fields to that state is involved."

Adding in that charge to the out-of-pocket costs and then following Mr. Lamb's theory of multiplying the out-of-pocket costs by four and then adding nearly fifty per cent. of the result for taxes and profits results in that erroneous charge being magnified approximately six hundred per cent in the total cost so computed. So the cost figure of $27.52 per car developed by the Commission for this movement, on which it found the revenue

under the high scale to be $41.60 per car, is obviously far exaggerated. It will be remembered that this movement was nearly half of the total movement in Florida during the two years of the high rate.

The important thing, as we see it, about this cost evidence with respect to this particular movement is that every time the railroad incurred the direct expense of $4.81 (assuming the entire out-of-pocket costs were correct) it got back $20.48 even under the Cummer Scale. The difference between those two amounts went toward the paying of the indirect and overhead costs of the railroad which go on whether the traffic moves or not. It is only by *volume* of traffic that these indirect and overhead costs of the railroad can ever be met. In 1932 the railroads were nearly all operating at a loss whereas some years before they had been profitable enterprises, and this was not because the rates were not just as high as they ever were, but because they were not securing the same volume of the traffic. That was pointed out by this Court in the former appeal in this proceeding where this Court said (282 U. S. at page 214):

> "The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage."

No principle could be ever better illustrated than by what has occurred in this proceeding.

(e) *The Evidence in the Original Hearing Before the Interstate Commerce Commission With Respect to the Compensatory Character of the Cummer Scale of Rates.*

The Cummer Scale of rates was shown to have originated in a contract dated June 29th, 1903, between the Cummer Lumber Company, which had established a mill in Jacksonville, Florida, and the Jacksonville & Southwestern Railroad, which was a railroad owned by the lumber company and constructed by it as a plant facility (Former Record, 258-260). The contract was to continue in effect for fifteen years. The Atlantic Coast Line Railroad bought the Jacksonville & Southwestern Railroad in 1904, acquiring the contract with the railroad (Former Record, 19).

On November 8, 1909, Mr. Walters, the Chairman of the Board of the Atlantic Coast Line Railroad wrote to Mr. Cummer a letter (Former Record, 311-312) in which he said: "I can assure you we have no more desire than you to make any change in the traffic agreements of June 29th, 1903, as we consider them quite as advantageous to us as they are to you, * * *".

In 1913 the Carpenter-O'Brien Company was locating a mill at Eastport, in the environs of Jacksonville, and in connection with the location of that mill in Jacksonville entered into an agreement, dated January 26, 1914, (Former Record, 261), with the Atlantic Coast Line Railroad for the transportation of about one billion feet of pine timber in Lafayette and Taylor Counties,

Florida, to its mill on rates which were approximately in line with the scale provided in the contract between the Cummer Lumber Company and Jacksonville & Southwestern Railroad Company. Observe, however, that the contract with the Cummer Lumber Company provided for a rate of $8.00 per car of 50,000 pounds for distances between 60 and 90 miles and for each additional 10 miles over 90 miles an additional charge of $1.00 per car. The rate voluntarily agreed upon and given to the Carpenter-O'Brien Company was $12.00 per car of 50,000 pounds from points between Clara and Perry, Florida, to Cedar Creek (or Eastport) Florida, the distance from Perry, Florida, being 166 miles (Former Record, 20).

It will thus be noted that when the Atlantic Coast Line Railroad in 1914 made this contract, instead of conforming to the scale provided in the contract with the Cummer Lumber Company, which would have been $16.00 per car for 166 miles, it voluntarily gave to the Carpenter-O'Brien Company (the predecessor of the Brooks-Scanlon Corporation) a lower rate of $12.00 per car. The railroad filed the tariff with the Florida Railroad Commission as a trainload tariff, but that Commission required that it either withdraw the tariff or make it applicable to single car loads anywhere in Florida, and the railroad elected to apply the scale to single cars as well as trainloads (Former Record, 628).

This action was not taken by the railroad either hastily or unadvisedly. After ten years of actual experience with the scale of rates, the rates given to the Carpenter-O'Brien on the long haul were 25% lower than the rates originally provided in the Cummer Lumber

Company contract, and the railroad voluntarily published the scale of rates for general application. The railroad cannot be heard to say that in 1914, when it voluntarily published this scale of rates, it did not know more about this scale of rates and its effect than anyone else, and that it had not had ample opportunity to investigate it and to reach its own conclusions about it.

The Florida Railroad Commission had made no investigation of the reasonableness of the rate when in 1914 it required the railroad to either withdraw the rate or apply it generally and informed the railroad at the time that if the rate was found to be unremunerative the railroad could apply to that Commission to change it (See statement of Chairman of Florida Railroad Commission, Former Record, 627-629). But the railroad never made any application to the Commission for any change in that rate (Former Record, 629), nor has anyone ever complained to the Florida Commission about the level of the rate although its doors have been open to receive any such complaint during all these years (R. 623).

In 1918 these rates were increased 25%, and again in 1920 they were increased 25% of their then existing level, and in 1922 they were reduced 10%, along with the increases and reduction in all freight rates, so that after 1922 the Gummer Scale of rates was at all times more than 40% higher than when it was published in 1914. (Former Record, 268-269).

When this proceeding came on in 1926, the railroad in its answer to the complaint before the Interstate Commerce Commission denied that there was or had been

any violation on its part of the Interstate Commerce Act and prayed "that it be hence dismissed" (Former Record, 199-200). Moreover, in the proceeding the railroad disclaimed any contention that the Cummer scale of rates was not compensatory and stated that it had not made and was not making any proposal to revise that scale of rates (Former Record, 491, 495-496).

The railroad introduced a cost study in the original proceeding (Former Record, 294-307). The same Mr. Perrin who was the principal witness of the railroad in the re-opened proceeding, after pointing out in the original proceeding that the average revenue per car under the Cummer Scale of the shipments to the Brooks-Scanlon Corporation and Putnam Lumber Company was $20.47, stated that in order "*to remove any incorrect impression that may exist that there is a very large amount of profit*" in these shipments, he had asked Mr. White, the Superintendent of Transportation of the railroad, to make a cost study with respect to those shipments (Former Record, 522). The cost study was then presented showing a small profit (Former Record, 294-307, 522-532, 560-562 and 709-715). Of course, Mr. White was not brought back in the re-opened proceeding, but a new statistician with a new theory of cost accounting was produced for the purpose of showing a loss instead of a profit. The difference between Mr. White and Mr. Lamb only illustrates the fact that the same statistics, if voluminous enough, may be used to prove any pre-conceived notion.

After the former unlawful order of the Interstate Commerce Commission was entered and attacked in the Courts, in 1929, the railroad intervened in defense of that

order and then and there for the first time expressed any dissatisfaction with the Cummer Scale.

The authorities are clear that proof that a particular carrier established and maintained a particular charge for the carriage of a particular commodity for a substantial period of time is persuasive evidence that the charge so established and maintained is reasonable.

L. & N. R. R. Co. v. Finn, 235 U. S. 601; Service Lumber Co. v. Sumpter Valley R. Co., 67 Ore 63, 135 Pac. 539.

The major part of the traffic moved in solid trainloads (Former Record 23), which the Interstate Commerce Commission itself declared to be less costly than handling the traffic in single carloads (186 I. C. C. 182). In such case the whole train of cars was placed by the shipper on a spur track and the railroad need only hook an engine and caboose to the train, move it to its destination, and deliver the train to one shipper without any substantial switching or delivery service (186 I. C. C. 182). When we consider this, and the simple nature of the equipment used and simple service rendered in the log traffic generally, the absurdity of attempting to measure its cost by the *average* cost of handling the *average* freight, either on the whole system or in Florida, is peculiarly apparent. Peculiar local conditions which do exist and with which local authorities are familiar are the reason this Court has declared in this case that the "reasonableness per se" of intrastate rates is to be determined by "state authorities."

(f) *The Reasonableness Per Se of Intrastate Rates has been Declared by this Court in this Proceeding to be a matter for Determination by State Authorities and Not the Interstate Commerce Commission.*

The contention made by the Interstate Commerce Commission here is that if any intrastate rate on a single commodity on a single railroad in Florida produces less earnings per car than the average cost per car of handling all freight traffic on the entire railroad, that then the Commission is authorized to step into Florida and raise that rate by declaring it to be a burden upon interstate commerce.

At best this could only be considered a determination as to the reasonableness of the rate, and the contention so made has been effectively and completely disposed of by this Court in the former appeal in this case. There this Court stated that "the Commission reached the conclusion that the intrastate rates assailed were less than reasonably compensatory". Noting that the Commission had reached that conclusion from the evidence, this Court said (282 U. S. at 214):

> "But to justify the Commission in the alteration of intrastate rates, it was not enough for the Commission merely to find that the existing intrastate rates on the particular traffic were not remunerative or reasonably compensatory. The

> authority to determine the reasonableness per se of intrastate rates lay with the state authorities and not with the Interstate Commerce Commission."

And this Court there pointed out just what conclusions must be reached and what findings must be made to justify such action in this proceeding. We have hereinbefore demonstrated that those findings were not made and that there is no evidence upon which they could be made.

This whole inquiry into the remunerative or compensatory nature of the rates is immaterial. But we have dealt with it at some length to more thoroughly demonstrate the arbitrary and unreasonable character of the action of the Commission, in attempting to act here merely because it appears that logs, a low grade commodity, do not produce as much revenue per ton as the average per ton produced by all commodities, a matter which everyone knows, a matter which could have been established in two lines of the report, and a matter which this Court in this very proceeding has condemned as insufficient to justify the action taken.

POINT VIII.

The District Court Erroneously Assumed that the Interstate Commerce Commission had Found the Average Cost of Hauling Logs Over the Atlantic Coast Line Railroad System, Whereas the Commission Made No Such Finding and There was No Evidence of Record Upon Which Such Finding Could Be Based.

(This is applicable to Assignment of Error No. 27.)

The District Court in its opinion said *(State of Florida v. United States, 4 F. Supp. 477, at 479)*:

> "On the question of the cost of the service, figures were considered which showed the average cost of hauling logs over the Coast Line System; exact figures for the particular traffic in Florida not being available."

We respectfully submit that this statement is without foundation in the record. We have hereinabove fully considered the cost evidence and have demonstrated that it consists of an attempt to convert system average or Florida division average costs for the transportation of all freight into costs of transporting logs by so denominating them, and that the results obtained bore no direct or proximate relation to the cost of handling the particular traffic in question, either upon the system or in Florida.

POINT IX.

The Rate Comparisons Furnish No Cause for the Invasion of State Domain By the Federal Power.

(This is applicable to Assignments of Error 1 to 5 inclusive, and 26).

The opinion of the District Court and the Report dated July 5, 1932, of the Interstate Commerce Commission showed that both relied greatly upon the rate comparisons which had theretofore been made by the Interstate Commerce Commission. We have already pointed out in the preceding portion of the brief the extent to which the Newly Reduced Rates had been established throughout the Southern and Southwestern Territory at the time the reports and orders of the Interstate Commerce Commission dated July 5, 1932, and January 9, 1933, became effective. The supplemental bills showed them to have been established in whole or in part upon 22 railroads in 10 States in the Southern Rate Group and upon 5 railroads in 5 States in the Southwestern Rate Group, in interstate and intrastate commerce. They had been established in interstate commerce on four railroads in Florida, namely, the Frisco System, the Louisville & Nashville Railroad, and the Georgia & Florida Railroad, and the Central of Georgia Railway. They were found by the report of the Interstate Commerce Commission to be substantially on the same level as the Cummer Scale. There was attached to and made a part of each supplemental bill a map show-

ing the extent to which these rates were effective at the time of the hearing of the second re-opened proceeding before the Commission. Suffice it to say that they are applicable upon all or part of most if not all of the lines whose rates were used by the Interstate Commerce Commission as standards of comparison in the Rate Comparisons referred to in its report of July 5, 1932, and by the District Court in its opinion.

We submit that the necessary inference with respect to the Newly Reduced Rates on those 23 railroads in those 14 states is that logs will not move freely in the South at rates substantially higher than the Cummer Scale—a thing which Florida shippers have been asserting throughout this proceeding.

But beyond all this, the efficacy of rate comparisons as a basis for the action here attempted by the Interstate Commerce Commission was fully considered by this Court in the former appeal in this proceeding. There this Court said (282 U. S. at pages 213-214):

> "The Commission made a comparison of 'present interstate and intrastate rates and the proposed interstate rates from north Florida in cents per 100 pounds, and the earnings thereunder per car of 50,000 pounds for distances to 170 miles.' The 'earnings' thus set forth were merely the amounts receivable per car for the given number of pounds under the rates for the prescribed distances. The Commission also stated that the carrier had shown that the earnings under the Florida intrastate rates on logs were ma-

terially lower than the earnings under the interstate rates from Florida to Georgia on brick, sand, lime and cement. Comparing the Florida intrastate rates on logs with other intrastate rates and with interstate rates, the Commission reached the conclusion that the intrastate rates assailed were less than reasonably compensatory.

"But to justify the Commission in the alteration of intrastate rates, it was not enough for the Commission merely to find that the existing intrastate rates on the particular traffic were not remunerative or reasonably compensatory. The authority to determine the reasonableness per se of intrastate rates lay with the state authorities and not with the Interstate Commerce Commission."

So even if the railroads throughout the South had not found that high rates will not transport logs and thereupon reduced log rates to the level of the Cummer scale, the comparison of rates could only indicate that a rate was not "remunerative or reasonably compensatory", which is not enough to justify action by the Interstate Commerce Commission, and is a matter for the consideration of the State authorities.

POINT X.

The Intrastate Rates Prescribed by the Commission for Application in Florida Were Minimum Rates, and Not Otherwise. The Interstate Rates Prescribed by the Commission for the Transportation of Logs from Points in North Florida to Destinations in Georgia were maximum Rates, and Not Otherwise. At No Time or Place, Other Than in this Proceeding in Florida, has the Commission Attempted to Prescribe Other than Maximum Rates on Logs. The Fixing of Minimum Rates on Logs over the Atlantic Coast Line in Florida was Arbitrary.

(This is applicable to Assignments of Error Nos. 5, 23, 43 and 44).

The finding of the report is (186 I. C. C. 189):

"We further find that the intrastate rates on logs over 6 feet in length, except walnut, cherry, and cedar, applicable between points on the Atlantic Coast Line in Florida for distances of 170 miles and less are, and for the future will be, unjustly discriminatory against interstate commerce, and that such unjust discrimination can be and should be removed by the establishment between all points on the Atlantic Coast Line in Florida for distances of 170 miles or less

> of rates not less than the rates shown for such distances in Appendix F hereto, which are the rates found reasonable for interstate application from northern Florida to Georgia."

The caption of Appendix F is "Minimum rates per 100 pounds prescribed herein on Florida intrastate log traffic," and the distances and rates are then set forth.

Thus the intrastate rate here prescribed is a minimum rate statewide in its application, fixed at the level at which maximum interstate rates had been fixed from certain portions of Northern Florida to Georgia. The intrastate log rates of the Atlantic Coast Line Railroad throughout the State of Florida are frozen at this level by the order. And it will be observed that the maintenance of these intrastate rates is in nowise dependent upon the maintenance of the interstate rates.

This point was considered in the Louisiana case *(United States v. State of Louisiana, supra)*, this Court there pointing out that the order there involved was likewise assailed because the intrastate rates involved were minimum rates whereas the Commission in its order fixing the general level of interstate rates "did not require the carriers to increase their rates interstate, but only permitted them to do so at their option." This Court there answered that contention by saying:

> "The order precluded any unauthorized interference with State regulatory power by providing that it should be effective only so long as the surcharges upon interstate rates should be maintained by the carriers."

But in the case at bar there are no statewide interstate rates prescribed to which the intrastate rates could be related, and the intrastate rates prescribed are not dependent for their existence or continuance upon any interstate rates. The hands of the "State regulatory power" of the State of Florida are effectually and completely tied by the order and its dominion over its state rates wholly usurped. The interstate rates for the nonexistent traffic from Northern Florida to Georgia might be changed or ended at any time, but such action would have no effect upon the intrastate rates here prescribed.

POINT XI.

The Order of the Interstate Commerce Commission, Being Statewide in Its Scope was Beyond the Scope of the Issue on Which the Controversy was Tried, and the Proceeding Was Not Appropriate Nor was the Hearing Sufficient.

(This is applicable to Assignments of Error Nos. 28, 29, 32, 33, 34, 36, 42 and 44).

(a) *The Status of the Complainant, the Georgia Commission, in This Proceeding.*

The record here shows the repeated assertion upon the part of the Georgia Commission that this proceeding was instituted by it as *parens patriae* for the benefit of the Georgia log shippers. The former report of the Inter-

state Commerce Commission declares in terms that it was on their behalf that the Georgia Commission instituted this proceeding. Therefore, the position of the Georgia Commission before the Interstate Commerce Commission is no different from that which any Georgia log shipper would occupy had this proceeding been brought by him in his own behalf.

Nothing is more clearly settled by this Court than that a shipper, qua shipper, has no interest in or concern with the effect which the transportation charges paid by him may have upon the revenues of the carrier. The Court emphatically so held in the case of,

Dayton-Goose Creek R. Co. v. United States, supra,

where it examined and considered its former decisions in the light of the Transportation Act of 1920. If the rate which is applied to the shipment of any particular shipper is a reasonable rate, he has no right to or concern with the level of it (Dayton Goose Creek R. Co. v. United States, supra). He has, of course, no direct interest in any other rate than the one which is applied to the shipment of his own goods, except that he has the right to invoke the power of the Interstate Commerce Commission to protect him and his locality against the undue preference and undue prejudice which prior to 1920 were prohibited by Section 3 of the Act, and are now prohibited by Section 13 (4) of the Act as well.

Not only was the gravamen of the complainant's complaint before the Interstate Commerce Commission the

alleged undue advantage, preference or prejudice as between persons and localities on the one hand and interstate commerce on the other hand, but the position taken by the complainant at the hearing before the Examiner (Former Record, 403, 417-418) excluded any notion that the complainant was interested in or asserted any right other than that to which it is confined by the law laid down in the case of Dayton Goose Creek R. Co. v. United States, supra. Not one time but several times, Mr. Price, rate expert of and sole witness for the Georgia Commission in the former proceedings before the Examiner, in terms made it clear that the end sought to be achieved under his complaint was the extension of the then effective *intrastate* rate (Cummer Scale) interstate into Georgia (Former Record, 416-417). He also declared in terms that the proceeding was "not a revenue case" (Former Record, 417).

In the re-opened proceeding the Georgia Commission took only a prefunctory part, and did not pretend to introduce any evidence having any bearing upon revenues, past, present or future. At the beginning of the re-opened proceeding the representative of the Georgia Commission was reminded that he had taken the position that this was not a revenue case and was asked if the position of that Commission had changed (R. 622). The Examiner ruled that it was unnecessary for him to answer the question (R. 624). When the Georgia Commission introduced no evidence of any revenue burden these appellants moved to dismiss the proceeding (R. 649). That motion was referred to and denied by the Interstate Commerce Commission, (186 I. C. C. 160).

(b) *The Status of the Defendant, Atlantic Coast Line Railroad Company, in this Proceeding.*

As has been pointed out, the defendant carrier by its answer in the original proceeding, denied that its interstate rates were unjust and unreasonable; denied that it was responsible for any discrimination; denied any violation of the Interstate Commerce Act, as amended, and demanded that "it be hence dismissed". (Former Record, 199-200).

In the production of its evidence it disclaimed any contention that the Cummer Scale of rates was not compensatory (Former Record, 491).

The carrier stated in the former proceeding that it made no proposal as to the Florida intrastate rates "because this would not be the proper time to suggest that, nor would it be the proper time to suggest what the rates should be in Georgia." It was dealing only with the interstate rate from Florida to Georgia in the proceeding (Former Record, 495-496). In its motion to re-open this proceeding, which motion was filed in March of 1931, after the coming down of the mandate of this Court, the carrier did not assert that the Florida intrastate rate resulted in an unjust discrimination against interstate commerce, or that the revenue derived from the intrastate traffic in question under that rate (the Cummer Scale), had been or would be such as to impair the income of the carrier, or to cause an undue burden upon the carrier's interstate commerce, or to obstruct the maintenance of an adequate transportation service. On the contrary, the motion of

the carrier was directed entirely to the reasonableness of the intrastate rate as such, and might well have been considered appropriate had it been directed to and filed before the Florida State Commission, but was utterly inappropriate to invoke the exercise of any Federal power in this proceeding. For as was pointed out by this Court in this proceeding, the authority to determine the reasonableness per se of intrastate rates lay with the State authorities, and not with the Interstate Commerce Commission.

Florida v. United States, supra.

(c) *The Nature of the Proceeding Before the Commission.*

We have shown that not only has the Georgia Commission, representing Georgia shippers as it does, no right in or concern with the revenues of the carrier, but also that the Georgia Commission never pretended to offer a scintilla of evidence tending to support any one of the several findings that this Court by its opinion in the former appeal has held to be prerequisite to the entry of any order of the Interstate Commerce Commission fixing state-wide intrastate rates, in any proceeding brought to remove an unjust discrimination against interstate commerce under the Interstate Commerce Act, as amended.

Thereupon the Commission in the re-opened record permitted the carrier over the protest of the State of Florida, and in derogation of its own original answer, to undertake to prove against itself the allegations of the complaint. This proceeding, even before the Commission, is

essentially an adversary proceeding between a sole defendant and a sole complainant. And we respectfully submit that the Commission should not and the Court will not countenance such collusive conduct on the part of parties quasi-litigant in an adversary proceeding, where constitutional and sovereign rights are involved.

All tribunals, even those acting quasi-judicially, are bound to observe "those general rules established in our system of jurisprudence for the security of private rights", and are in duty bound to require that the proceedings had be appropriate to the case and just to the parties affected. *Hagar v. Reclamaion Dist., No. 108, 111 U. S. 701.*

And in no tribunal and in no proceedings however informal such proceedings may be, should parties quasi-litigant be permitted to approbate and reprobate in one and the same proceeding. For that is what the carrier here was permitted to do.

The Commission should not have exercised Federal power in this case, even though it concluded that it could do so, for the reasons set forth by this Court in the case of *Lawrence v. St. Louis-San Francisco Ry. Co., 274 U. S. 588, text 594-595,* where this Court said in speaking of the national and state powers in the regulation of railroads:

> "The delimitation of the respective powers of the two governments requires often nice adjustments. The federal power is paramount. But public interest demands that whenever possible conflicts between the two authorities and irritation be avoided. To this end it is important that the federal power be not exerted unnecessarily,

hastily, or harshly. It is important also that the demands of comity and courtesy, as well as of the law, be deferred to."

We repeat that not only is there a want of evidence upon which the Commission could make the findings held by this Court to be essential to justify the invasion of the State domain, but also the fundamental rules which underlie the conduct and determination of adversary proceedings which are controlling upon every body acting quasi-judicially, as well as the rules of comity and courtesy due by the National sovereign to the State sovereign required that this proceeding be dismissed.

POINT XII.

The Interstate Commerce Commission Has the Power to Prescribe Intrastate Rates Only When the "Jurisdictional Facts" Authorizing Such Action Have Been Made to "Clearly Appear". The Existence of Such Jurisdictional Facts is a Judicial Question Which Must be Determined by the Judicial Branch of Government in a Proper Judicial Proceeding, Irrespective of any Finding Which May Have Been Made by the Interstate Commerce Commission.

(Applicable to Assignments of Error 34 to 42, inclusive)

The jurisdiction of the Interstate Commerce Commis-

sion to exercise any regulatory power over intrastate rates depends upon the existence of facts which constitute a discrimination against or burden upon interstate commerce. The authority to determine and prescribe intrastate rates is primarily vested in the State and not in the Interstate Commerce Commission. The Interstate Commerce Commission has no concern with or authority over intrastate rates as such. It is only when intrastate rates interfere with and cast a burden upon interstate commerce that the Interstate Commerce Commission may exercise any jurisdiction whatsoever over such rates. The existence of the fact of such interference and burden must be found in the first instance by the Interstate Commerce Commission before it can have any jurisdiction over intrastate rates. Such finding by the Interstate Commerce Commission is a finding of its own jurisdiction and is subject to review by the courts and upon such review it is not sufficient that the finding be supported by what is known as "the substantial evidence" rule.

(a) *The Authority of the Interstate Commerce Commission to Prescribe Intrastate Rates Depends Upon the Existence of Jurisdictional Facts and the Determination as to the Existence of those Facts is a Judicial Question.*

In substantially all of the cases involving the jurisdiction of the Commission over intrastate rates which have been before this Court the fact of discrimination or bur-

den has been unquestioned or established by the overwhelming weight of the evidence and the questions contested have been with reference to the interpretation and application of the law.

Thus in the *Shreveport case, 234 U. S. 342*, where the Court upheld the power of the Interstate Commerce Commission to fix intrastate rates in order to remove discrimination against persons and localities, it is said, text 346:

> "It is undisputed that the difference was substantial, and injurjously affected the commerce of Shreveport."

It will therefore be seen that there no question was raised as to the fact of discrimination, that fact being admitted.

In the *Wisconsin case, 257 U. S. 563*, where the power here sought to be exercised was first sustained, it was shown without contradiction that the maintenance of the existing intrastate rates would reduce the carriers' revenue $6,000,000 below what it would be under intrastate rates on the general level prescribed for interstate rates and both the Commission and the Court held that this constituted discrimination against interstate commerce. Here again there was apparently no question as to the facts, but the question was as to the power of the Commission.

In cases where the Interstate Commerce Commission is exercising its direct authority, in prescribing interstate rates, this Court has held that the determination of questions of fact is by law imposed upon the Commission and

that the Court will review the testimony only to determine whether the findings of fact made by the Commission are supported by sufficient evidence to save the Commission's finding from being arbitrary action, that is, the "substantial evidence" rule. But prior to the former decision of this case (*Florida v. United States*, supra), this Court had used language which clearly indicated that where the jurisdiction of the State was to be ousted the evidence had to be much more convincing than was required where the Court was reviewing orders of the Interstate Commerce Commission fixing interstate rates.

In the case of *Railroad Commission of Wisconsin v. Maxcy, 281 U. S. 82*, decided March 12, 1930, the Court, in discussing the failure of the Court below to render an opinion, said:

> "* * * 'the respect due to the State demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown'."

In the *Wisconsin case*, supra, it is said that action of the Interstate Commerce Commission in changing State rates "* * * should be directed to substantial disparity which operates as a real discrimination against, and obstruction to interstate commerce, * * *". In other cases the Court has held that the intention of the Interstate Commerce Commission to interfere with the State function of regulating intrastate rates "is not to be presumed." *Arkansas R. R. Co. v. C. R. I. & P. Ry. Co., 274 U. S. 597.*

In the *Illinois Central Case, 245 U. S. 493, 510,* the Court said that:

> "* * * it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as its purpose to do so is *clearly manifested* (citing cases). This being true of an act of Congress, it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a State rate statute otherwise valid, *unless, and except so far as it conforms to a high standard of certainty.*" (Italics supplied.)

When dealing with interstate matters committed to its jurisdiction the Commission is acting as the agency of Congress in controlling matters which the Constitution expressly commits to the Federal Government. The Commission is, therefore, in such cases, acting as an administrative body and its findings can only be set aside when they are so wanting in support by any substantial evidence as to constitute arbitrary action. When the Interstate Commerce Commission comes to deal with intrastate rates, however, it is exercising a jurisdiction which depends upon the fact of discrimination against or burden upon interstate commerce and in such case the justification of its action must clearly appear.

The distinction is logically explained in the concurring opinion of Circuit Judge Bates, in the case of *Eastern Texas Railroad Company, et al. v. Railroad Commis-*

sion of Texas, et al., 242 Fed. 300, where it is said, text 307:

> "The Supreme Court has held that the Commission may determine what is a reasonable interstate rate, and what rate must be charged on intrastate business to prevent a discrimination when both rates are in use. But the authority of the Interstate Commerce Commission with reference to intrastate rates is purely incidental and remedial. The qualities of such an order are radically different from those of an order resulting from the exercise of the legislative function involved in ratemaking. To hold that it may, under any circumstances, regulate a state rate, is to carry the rules of interpretation to the extreme limit, in view of the proviso in the first section of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379, Comp. St. 1916, §3261). It may be held that it has the power to make such orders affecting intrastate rates as are necessary to prevent discrimination; certainly, the authority will not go beyond the necessity. When the Interstate Commerce Commission acts with reference to such a matter, it makes, or should make, the same character of investigation and the same character of determination that would be made by a court if a carrier charging the intrastate and the interstate rates were prosecuted for a violation of the Interstate Commerce Commission Act. Its action would be more nearly judicial than legislative.

> Whenever such an order is under consideration by a court, the court would have to determine whether the jurisdiction of the Interstate Commerce Commission had been exceeded; and it would doubtless decline to apply the same rules with reference to the conclusiveness of the action of the Interstate Commerce Commission that obtain when that body is, in the exercise of its established legislative authority, making rates. It would not permit the Interstate Commerce Commission to conclusively determine its jurisdiction by determining the fact of the discrimination upon which its jurisdiction would depend."

In fixing interstate rates the Commission is exercising a legislative function, while *in determining the facts necessary to its jurisdiction over intrastate rates*, it is performing a judicial function.

The power of the Interstate Commerce Commission to fix intrastate rates because they cast a burden upon or discriminate against interstate commerce generally is found only by construction and implication. It involves an invasion of the powers otherwise reserved to the States. Only in a clear case of necessity will such power be sustained by the Court.

Some of the foregoing cases were cited to this Court on the appeal in connection with the former order of the Commission in this proceeding upon this very contention. In response to this contention, so made, the Court in its opinion said; 282 U. S., text 211:

> "The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the Federal power is exerted within what would otherwise be the domain of State power, *the justification of the exercise of the Federal power must clearly appear.*" (Italics supplied.)

The Court declared that there was no necessity to examine the evidence to see whether it "properly supported" the findings of the Commission, but condemned the order for "lack of the basic or essential findings required to support the Commission's order." These were the findings upon which the jurisdiction of the Commission to act depended.

(b) *The Character of Review Which the Courts Must Give to Findings of Jurisdictional Facts Made by Administrative Tribunals Where Constitutional Rights are Involved.*

In the case of *Crowell v. Benson, 285 U. S. 22*, the Court considered and announced the rule as to the character of review which the courts must give as to findings of *jurisdictional facts* made by administrative tribunals where such findings involve constitutional rights. This Court there held that the Congress had authority to prescribe the procedure in cases of injury upon navigable waters, and to commit the determination of the facts, as to the

circumstances, nature; extent and consequences of the injury sustained, to the Compensation Commission established by it. But the Court then said; text 54:

> "What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the determinations of fact are fundamental or 'jurisdictional', in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly, but also *because the power of the Congress to enact the legislation turns upon the existence of these conditions.*" (Italics supplied.)

It will be noted that the Court points out that the power of Congress to enact the legislation "turns upon the existence of these conditions", i.e., the jurisdictional facts of employment and that the injury occurs upon navigable waters of the United States.

In the case at bar the power of Congress to legislate as to intrastate rates "turns upon the existence" of the fact of discrimination against and burden upon interstate commerce. Unless that fact exists the Congress itself may not, under the Constitution, enact legislation

with respect to intrastate rates, and, of course, may not authorize a tribunal, created by it, so to do.

In the *Crowell Case, supra,* the Court held that the employer was entitled to a *trial de novo* upon the jurisdictional facts, saying, text 58:

> "And where administrative bodies have been appropriately created to meet the exigencies of certain classes of cases and their action is of a judicial character, the question of the conclusiveness of their administrative findings of fact generally arises where the facts are clearly not jurisdictional and the scope of review as to such facts has been determined by the applicable legislation. None of the decisions of this sort touch the question which is presented where the facts involved are jurisdictional or where the question concerns the proper exercise of the judicial power of the United States in enforcing constitutional limitations."

The case here comes squarely within the language above quoted, because here "the facts involved are jurisdictional" and "the question concerns the proper exercise of the judicial power of the United States in enforcing constitutional limitations".

This case is brought to enforce the constitutional right of the State of Florida and of its citizens to a judicial determination of their controversy and the judicial power of the United States is invoked to that end. We, therefore, rely upon the following language of the Court in the Crowell case, viz:

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."

The question in the instant case is not only whether the Commission has acted improperly or arbitrarily, as shown by the record of the proceedings, in a case within the contemplation of the statute and of the Constitution, but also whether it has acted in a case to which the statute is applicable.

It has long been the settled rule of this Court that where State-made rates are to be interferred with, even upon constitutional grounds, by the power of the Court "that that power ought to be exercised only in the clearest cases", and that in such cases even where there have been findings of fact by a master, confirmed by the trial court, "this Court will not fetter its discretion or judgment by any artificial rules as to the weight of the master's findings, however useful and well settled these rules may be in ordinary litigation."

Knoxville v. Knoxville Water Company, supra.

This Court on the appeal of the former order of the Commission *(Florida v. United States, supra)*, has said that "the justification of the exercise of the Federal power must clearly appear." The Constitution not only vests the judicial power in the Courts, but recognizes that the States,

being sovereigns, are entitled to invoke the original jurisdiction of this Court in controversies between themselves and between themselves and others. It is inconceivable that Congress has attempted to authorize a subordinate administrative tribunal not only to invade the reserved powers of the State at will but also to *conclusively* determine for itself its own jurisdiction in connection with that invasion.

(c) *The Character of the Review of the Evidence Sought by the Appellants Here and Essential to the Preservation of their Constitutional Rights.*

Undoubtedly the appellants here are entitled to an independent judicial determination by this Court of the jurisdictional fact as to the existence of such discrimination against interstate commerce as is necessary to vest in the Interstate Commerce Commission authority to prescribe intrastate rates. Here the State of Florida asked for trial de novo, such as was granted in the Crowell Case, while the petitioning lumber companies asked for an independent determination of the jurisdictional question upon the evidence taken before the Commission.

When we consider the kind of a proceeding which this was, with the complainant first disclaiming any contention for the relief which was granted by the Commission and then in the re-opened proceeding refusing to state its position and the relief desired, and the defendant before the Commission first disclaiming any conten-

tion that the state rates were not remunerative and then in the re-opened proceedings undertaking to prove the contrary when no evidence on that subject was offered by the complainant there, and when we consider the evidence upon which the Commission relied and the findings which it made, it is not surprising that the appellants feel that the reserved rights and powers of the State have been invaded and usurped in an extra-judicial proceeding and that they are demanding a judicial determination of those rights.

The right to such a determination in such a case as this is sustained by logic and reason. Where two sovereigns, under the Constitution of the United States, are claiming conflicting jurisdiction, the case is certainly one "arising under this Constitution," as that language is used in Section 2 of Article III of the Constitution, wherein is defined the extent of the judicial power which is thereby established. As stated by Circuit Judge Batts, in *Eastern Texas Railroad Co. v. Railroad Commission of Texas*, supra, "in such a case the Court would not permit the Interstate Commerce Commission to conclusively determine its jurisdiction by determining the fact of the discrimination upon which its jurisdiction would depend". Were the rule otherwise it would simply mean that one of the parties in a controversy as to jurisdiction between two sovereigns under the Constitution, could determine for itself and against the other party without any right in the other party to a judicial determination of the conflicting claims so long as the decision, in its own favor, by the first party was supported by such evidence as would save it from being arbitrary action. To so hold is for the courts to abdi-

cate their constitutional powers and leave to a federal agency the conclusive determination of a controversy as to jurisdiction between it and a sovereign state and its citizens, and to strike down the reserved rights of the State under the Federal Constitution. *Knoxville v. Knoxville Water Co., supra; Crowell v. Benson, supra.*

We, therefore, confidently submit that both reason and authority require the independent determination, by this Court, of the fact of the existence of such a burden upon interstate commerce as is necessary to bring into being any power of the Interstate Commerce Commission to prescribe state rates before the order of the Commission can be upheld.

CONCLUSION

The Cummer Scale of rates, the lawful State rate, was voluntarily established by the carrier nearly twenty years ago. It was established after ten years' operating experience on one branch line of its road. After its establishment, it was twice increased by 25%, and once reduced by 10%, so that at all times after 1922, it was more than 40% higher than it was when originally established. When it was established the record shows that the Florida Railroad Commission informed the carrier in effect that its doors were and would remain open to consider the level of the rate in the event that the carrier wished to change it. More than fifteen years went by and when this proceeding was first initiated by the Georgia Public Service Commission, the carrier defended the rate and in those proceedings expressly disclaimed any notion of altering it. After the first

order of the Interstate Commerce Commission was entered the carrier intervened in defense of it. When the carrier did so, in 1929, it was the first time in nearly thirty years' operating experience under the Cummer Scale that any dissatisfaction of the rate was expressed by it. And that dissatisfaction has never yet been expressed in the only forum which, under the decision of this Court, has the jurisdiction to determine the "reasonableness of the rate per se", viz., the Florida Railroad Commission.

Twenty-three railroads operating between and in fourteen or more Southern and Southwestern States were permitted by the Interstate Commerce Commission to institute Newly Reduced Rates which are as low or lower than the Cummer Scale. They are applicable within and between every State in the Southern Rate Group except West Virginia. Those Newly Reduced Rates were substituted for higher rates which were among the chief standards of comparison employed by the carrier and the Interstate Commerce Commission, and upon which great reliance was placed by the carrier in the evidence and by the Interstate Commerce Commission in its report and order of July 5, 1932.

At the time when the Commission was making its orders here involved the general level of log rates throughout the Southern Rate Group had become or was then rapidly becoming that of the Cummer Scale or its equivalent, or lower. The intrastate rate prescribed is approximately double that generally in effect in interstate and intrastate commerce. No general level of interstate log rates had ever been established by the Commission. Nor had that Commission ever established log rates for interstate application

even on the single carrier involved in the order, except for application from the limited area in Northern Florida to Georgia within which area no logs have ever moved in interstate commerce on the lines of this carrier. The order here involved relates only to rates on a single commodity on a single railroad in a single State. It is at best an inquiry into the reasonableness per se of the Florida intrastate rates on logs.

The so-called cost studies prepared by the carrier but discarded by the Commission, and the cost study unlawfully prepared and relied upon by said Commission (Exhibit E to the Commission's report) were all based upon system averages and system averages have not only been repeatedly condemned by the Interstate Commerce Commission in its own reports and by this Court in its adjudicated cases, but were likewise condemned by the Interstate Commerce Commission in the very report under attack.

In addition to all this the Commission did not make the findings required by this Court in the Florida Log Case, supra, and could make no such findings from the evidence in the record before it. Not only did it make no findings as to the amount of revenue which had been derived in the past from the traffic in question under the existing intrastate rate (the Cummer Scale), but it refused to require the carrier to produce evidence upon this subject, although repeatedly urged by the State and by the interveners herein to require the carrier so to do. It made no findings as to the amount of revenue which could reasonably be expected to be derived from the traffic in question under the increased intrastate rate which the Commission proposed to establish. The Commission made certain indefinite con-

jectures in this connection which were not findings, and which were applicable solely to what revenue might be derived under normal economic conditions, while at the same time recognizing the present existence of abnormal economic conditions, and making no finding or guess when the present abnormal conditions would cease and normal conditions return. There was no evidence before the Commission upon which it could make this particular finding required by this Court either with respect to normal or abnormal times. The Commission failed to demonstrate by its findings that any burden which did exist was of such character and consequence that it was the affirmative duty of the Commission, as an important step in the maintenance of an adequate national transportation service, to remove the same, or, "that the alteration of the intrastate rates" would "produce or was likely to produce", an additional and greater amount of income and that such additional and greater amount of income was actually necessary to prevent "an undue burden upon the carrier's interstate revenues" and necessary to maintain an adequate (national) transportation service, nor was there any evidence before the Commission upon which those findings could be made.

The one thing that is demonstrated by the report of the Interstate Commerce Commission is that there will be no interstate commerce in logs at the interstate rate prescribed approximately four years ago, and in force and effect ever since. The report has further demonstrated the accuracy of the forecast made by the Florida shippers that the unlawful order of the Interstate Commerce Commission originally entered in this proceeding would destroy pros-

perous communities and millions of dollars in property. It likewise has shown that for the time being at least the unlawful order almost completely destroyed the traffic in pine logs, and when that unlawful order was set aside by the order of this Court, it was rapidly destroying the lesser traffic in cypress and hardwood logs. And to a like extent it was destroying the revenue derived from that traffic, as this Court said might happen.

The truth is that from the very beginning of this controversy, the Interstate Commerce Commission, the carrier and the District Court have assumed that the power and duty of the Interstate Commerce Commission to deal with this State rate was no less than its power and duty to deal with interstate rates in general, without regard to the power and duty of the State in that connection, and without regard to peculiar local conditions surrounding the establishment and operation and maintenance of the state rate.

If this order of the Interstate Commerce Commission can be upheld, then indeed the State is deprived of every vestige of control over its own rates and the Federal Commission has unified control of the rates and concerns of the carriers to the entire exclusion of State authority.

We submit that under the Federal Constitution, the laws of Congress, and the decisions of this Court, the order of the Commission must go down.

Respectfully submitted,

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APPENDIX

STATUTES RELIED UPON

The Interstate Commerce Act, (41 Stat. L., 474):

Section 1:

"(2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

"(5) All charges made for any service rendered or to be rendered in the transportation of * * * property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 3:

"(1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or

any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 13:

"(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matter com-

plained of in such manner and by such means as it shall deem proper.

(2) * * * The Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders of the payment of money.

(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause

the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall

prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Section 15:

"(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged or collected, by any common carrier or carriers subject to this Act for the transportation of * * * property * * * as defined in the first section of this Act, * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and

reasonable individual or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged * * * and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect, any rate, fare or charge, for such transportation * * * other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be * * *"

Section 15a:

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management, and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust and unreasonable, and to prescribe dif-

ferent rates for different sections of the country."

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due con-

sideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

(6) If, under the provisions of this section, any carrier, receives for any year a net railway

operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission find are under common control and management and are operated as a single system, shall be computed for the system as a whole, irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4)."

The District Court Jurisdiction Act (C. 32, 38 Stat. L., 219):

"The Commerce Court, created and established by the Act entitled 'An Act to create a Commerce Court and to amend the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes,' approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment * * *.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation, or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the or-

der does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment, the term 'destination' shall be construed as meaning final destination of such shipment.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court. No interlocutory injunction suspending or restraining the enforcement, operations, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless

a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants int he suit; *Provided*, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges, concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitoner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such applica-

tion for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the state.

The Commerce Court Act (C. 309, 36 Stat. L., 539):

"SEC. 1. That a court of the United States is hereby created which shall be known as the Commerce Court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission.

Third. Such cases as by section three of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' Approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

Nothing contained in this Act shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court.

The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this Act shall not affect the jurisdiction now possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes."

"Sec. 211. All cases and proceedings in the Commerce Court which but for this chapter would be brought by or against the Interstate against the United States, and the United States Commerce Commission, shall be brought by or may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved."

"Sec. 212. The Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court; if in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon

him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, that the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of Justice and speed the determination of such suit: *Provided, further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the terms of this chapter, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof, and the Attorney General shall not dis-

pose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General of the United States therein.

"Sec. 213. Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel and under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

Act of February 13, 1925 (C. 229, 43 Stat. L. 936).

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That sections, 128, 129, 237, 238, 239, and 240 of the Judicial Code as now existing be, and they are severally, amended and re-enacted to read as follows:

* * * * *

"Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

* * * * *

(4) So much of 'An Act making appropriations to supply urgent deficiencies in appropria-

tions for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

Act of January 31, 1928 (C. 14, 45 Stat. L. 54).

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That the writ of error in cases civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"Sec. 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required; *Provided, however*, That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

Act of April 26, 1928 (C. 440, 45 Stat. L. 466).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

Assembled, That section 2 of an Act entitled "An Act in reference to writs of error," approved January 31, 1928, Public, Numbered 10, Seventieth Congress, be, and it is hereby, amended to read as follows:

"Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

Act of October 22, 1913 (C. 32, 38 Stat. L. 220)—Judicial Code, Section 210.

"A final judgment or decree of the Commerce Court (district court) may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a district court of the United States to the Supreme Court, and the Commerce Court (district court) may direct the original record to be transmitted on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse, or modify the final judgment or decree of the Commerce Court (district court) as the case may require. Appeal to

the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the Commerce Court (district court) appealed from, unless the Supreme Court or a justice thereof shall so direct; and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the Commerce Court (district court) granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree. Appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court." (36 Stat. L. 1150.)